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IN THE

Supreme Court of the United States

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, allows gaming on trust property acquired by the United States after 1988 for the benefit of an Indian tribe, provided that the Secretary of Interior determines that such off-reservation gaming "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Section 2719(b)(1)(A) also provides, however, that the Secretary cannot act upon her own otherwise final, favorable determination, unless "the Governor of the State . . . concurs in the Secretary's determination." *Id.* The questions presented are:

1. Whether the gubernatorial-concurrence provision of § 2719(b)(1)(A) violates core principles of separation of powers, including the Appointments Clause, by handing over the final federal decision to an individual (i.e., the Governor) who is not subject to any Presidential control?

2. Whether the gubernatorial-concurrence provision violates basic principles of federalism because it rearranges the structure of state government, by which a state has defined itself as a sovereign, and because it makes a state constitutional officer a federal decisionmaker?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners, plaintiffs-appellants below, are the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, a federally recognized Indian Tribe with its reservation in Sawyer County, Wisconsin; the Red Cliff Band of Lake Superior Chippewa Indians, a federally recognized Indian Tribe with its reservation in Bayfield, Wisconsin; and the Sokaogan Chippewa Community (Mole Lake Band of Lake Superior Chippewa Indians), a federally recognized Indian Tribe with its reservation in Mole Lake near the City of Crandon in northern Wisconsin.

Respondents, defendants-appellees below, are the United States of America; the United States Department of the Interior; Gale A. Norton, Secretary of the Department of Interior; and James H. McDivitt, Deputy Assistant Secretary/ Indian Affairs. Respondents, intervening defendants-appellees below, are James E. Doyle, Governor of the State of Wisconsin, and the State of Wisconsin.

Because none of the parties is a corporation, no Rule 29.6 statement is required.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, three federally recognized Indian tribes located in Wisconsin, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see infra* Appendix to Petition (Pet. App.) 1a-30a, is reported at 367 F.3d 650 (7th Cir. 2004). One opinion of the district court, Pet. App. 31a-58a, is reported at 259 F. Supp. 2d 783 (W.D. Wis. 2003), and the other, Pet. App. 59a-64a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2004. Pet. App. 1a. A timely petition for rehearing was denied on July 19, 2004. Pet. App. 65a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case concerns the constitutionality of one provision of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* Specifically, while § 2719(a) of IGRA prohibits Indian gaming on newly acquired Indian lands, § 2719(b) provides an exception:

> (1) Subsection (a) of this section will not apply when—
>
> > (A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, *but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination* . . . .

25 U.S.C. § 2719(b) (emphasis added). It is this gubernatorial-concurrence provision of § 2719(b)(1)(A) that is at issue here.

STATEMENT

This case presents important questions concerning the constitutional authority of Congress to interpose the Governors of the States as dispositive decisionmakers within a federal administrative scheme. In order to place these issues in context, it is useful to describe (1) the basic structure and operation of IGRA insofar as these are relevant to this case, (2) the application of petitioners pursuant to § 2719(b)(1)(A)

of IGRA for authorization to conduct off-site gaming operations and the favorable two-part factual determination of the Secretary of the Interior, (3) the refusal of the new Governor of Wisconsin to provide the concurrence in the Secretary's determination required under § 2719(b)(1)(A), and (4) this lawsuit.

1. Congress's Enactment of IGRA. In the 1970s and 1980s, with the encouragement of the federal government, gaming emerged as a major source of funding for the economic development of Indian tribes. While some States opposed these developments, this Court held in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), that the regulation of gaming by Indian tribes located in States that merely regulated (rather than altogether prohibited) gaming was beyond the authority of the States.

Congress responded by passing IGRA in 1988. The act reflected Congress's finding that "the establishment of independent Federal regulatory authority for gaming on Indian lands [and] the establishment of Federal standards for gaming on Indian lands . . . are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). IGRA's numerous provisions sought comprehensively to govern relations among the tribes, the States, and the federal government with respect to Indian gaming.[1]

This case involves § 2719 of IGRA, which governs gaming "on lands acquired by the Secretary in trust for the benefit of

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[1] IGRA has been directly before this Court on two previous occasions. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court held that IGRA § 2710(d)(7) violated the Eleventh Amendment by permitting tribes directly to sue States in particular circumstances. In *Chickasaw Nation v. United States*, 534 U.S. 84 (2001), the Court held that IGRA § 2719(d)(1) did not exempt two tribes from paying taxes imposed by the Internal Revenue Code.

an Indian tribe after October 17, 1988," 25 U.S.C. § 2719(a), which are usually referred to as "after-acquired trust lands." This provision creates the opportunity for tribes located on isolated reservation lands to obtain the same economic benefits as tribes located near a large population base. After-acquired trust lands are typically obtained by the United States in trust for the benefit of Indian tribes pursuant to the general authorization of 25 U.S.C. § 465, a statute that predates IGRA.

More specifically, § 2719(b)(1)(A) permits off-reservation gaming when the Secretary of the Interior, after consulting tribal, state, and local officials, "determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).

2. Petitioners' Application for Off-Reservation Gaming. Petitioners are three economically disadvantaged Indian tribes with rural reservation lands in northern Wisconsin. In October 1993, petitioners submitted their application to the Secretary of the Interior for approval of off-reservation gaming at a facility located near the Twin Cities, in Hudson, Wisconsin. In order to permit the Secretary to make the two-part factual determination required by 25 U.S.C. § 2719(b)(1)(A)—concerning whether "a gaming establishment on newly acquired lands [1] would be in the best interest of the Indian tribe and its members, and [2] would not be detrimental to the surrounding community"—the Department of the Interior undertook a lengthy process.

Interior developed a record through environmental and economic studies and through consultations with petitioners and other interested parties, including local municipal governments, state officials, and nearby Indian tribes, as is

required by the unchallenged portion of § 2719(b)(1)(A). This record was developed in the first instance, in accordance with Interior's procedures, by the Minneapolis Area Office of the Bureau of Indian Affairs of the Department of the Interior. This process culminated in favorable recommendations on petitioners' application, first from the Bureau's Area Director in Minneapolis and then from Interior's professional staff in Washington.

Despite these recommendations, the Department of the Interior rejected petitioners' application on July 14, 1995. Petitioners thereupon commenced a lawsuit in the United States District Court for the Western District of Wisconsin, challenging the Department's decision pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* *Sokaogon Chippewa Community v. Babbitt*, No. 95-C-659-C (W.D. Wis.). The complaint alleged, among other things, that Interior officials had violated their duty to consult with petitioners and that the decision was a result of improper political influence. In 1997, District Court Judge Barbara Crabb ruled that "there is considerable evidence that suggests that improper political pressure may have influenced agency decisionmaking," *Sokaogon Chippewa Community v. Babbitt*, 961 F. Supp. 1276, 1286 (W.D. Wis. 1997), and authorized discovery outside of the 3400-page administrative record. This decision, coupled with other events, prompted two congressional investigations and a federal grand jury investigation conducted into the Secretary of the Interior by an independent counsel. The civil case was settled with an agreement that the denial of petitioners' application would be vacated and that the Department of the Interior would review the petitioners' application anew. *See Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941 (7th Cir. 2000) (recounting certain of these events).

Pursuant to the settlement, aspects of the administrative record were updated and, on February 20, 2001, the office of the Secretary of the Interior made the favorable two-part factual findings.

3. The Refusal of Wisconsin's New Governor to Concur in the Secretary's Determination. Throughout most of these events, Wisconsin's Governor was Tommy G. Thompson. However, Governor Thompson was offered a cabinet position in the Bush Administration and resigned on February 1, 2001, just weeks before the Secretary of the Interior executed the favorable two-part factual determination under § 2719(b)(1)(A). Lieutenant Governor Scott McCallum ascended to the Office of Governor.

While Governor Thompson had previously indicated support for the project (provided that it included three economically depressed Wisconsin tribes) and had approved a separate application of a different Indian tribe for off-reservation gaming (in Milwaukee), Governor McCallum expressed, both before and after being sworn into his new position, a philosophical opposition to gaming in general. In a letter to Governor McCallum dated February 20, 2001, the Department of the Interior advised the Governor that the Secretary had determined that the proposed facility at issue here was in the best interests of petitioner tribes and would not be detrimental to the surrounding community and asked for the Governor's concurrence in these findings. Detailed findings of fact prepared by Interior, supported by a massive record, were delivered to Governor McCallum shortly thereafter.

By letter dated May 11, 2001, Governor McCallum formally advised the Secretary of his nonconcurrence. His letter cited a variety of reasons unrelated to the Secretary's two factual determinations. Pet. App. 70a-77a. The Department of the Interior thereupon denied the application,

based entirely upon the refusal of the Governor under § 2719(b)(1)(A) to concur in the Secretary's determination. Pet. App. 68a-69a.

4. This Lawsuit. On May 10, 2001, petitioners brought this action against the United States in the United States District Court for the District of Columbia. Federal jurisdiction was based on 5 U.S.C. §§ 701-706 and 28 U.S.C. §§ 1331, 1346, 1361, 1362, and 2201. The State of Wisconsin and Governor McCallum intervened as defendants, and the case was eventually transferred to the Western District of Wisconsin.

The action sought a declaration that the gubernatorial-concurrence provision of § 2719(b)(1)(A) of IGRA is unconstitutional. Petitioners argued that the provision violates the separation of powers because it transfers authority from the federal Executive to the States' Governors. Petitioners contended as well that the provision violates principles of federalism both because it commandeers Governors and requires them to make a federal administrative decision and because it rearranges the balance of powers and duties established by Wisconsin's constitutional structure of government.[2]

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[2] Petitioners' suit raised other contentions, including an interpretive question under the statute. Petitioners argued that the text of § 2719(b)(1)(A) establishes that a Governor must employ the same two-factor test already favorably employed by the Secretary. *See* 25 U.S.C. § 2719(b)(1)(A) (off-reservation gaming permitted if Secretary "*determines* that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted *concurs in the Secretary's determination*") (emphasis added). Interestingly, this also appears to be the view held by the 20 States that appeared in the Seventh Circuit as *amici* in support of respondents. However, respondents (the federal government, Wisconsin, and its Governor) maintained that a Governor is free under § 2719(b)(1)(A) to apply any factors he or she chooses.

The district court rejected petitioners' various constitutional arguments and granted respondents' motions for judgment on the pleadings. Pet. App. 58a. The court subsequently denied petitioners' Rule 59 motion. Pet. App. 64a.

The court of appeals affirmed. Pet. App. 30a. The court addressed first petitioners' separation-of-powers claim and, in particular, their contention that § 2719(b)(1)(A) unconstitutionally diverts to the Governors of the States the federal government's final decisional authority with respect to Indian tribes' applications for off-reservation gaming. Relying on cases such as *INS v. Chadha*, 462 U.S. 919 (1983), which struck down the one-house-veto provision for federal executive decisions, and *Printz v. United States*, 521 U.S. 898 (1997), which held the transfer of responsibility for handgun-purchaser background checks outside of the federal Executive Branch to be unconstitutional, petitioners maintained that Congress cannot confer upon an actor outside the federal Executive Branch the power to override the execution of federal law by the President (in this instance, through the Secretary of the Interior).

The court of appeals did not deny that under § 2719(b)(1)(A) someone other than a member of the federal Executive Branch effectively possesses ultimate decisional authority on petitioners' applications. It nonetheless concluded that federal separation-of-powers principles are not offended because § 2719(b)(1)(A) can be analogized to a type of statute termed "contingent legislation" by the case law. The court of appeals specifically relied on three decisions of this Court, none more recent than 1939, upholding statutes that made the imposition of certain economic regulation contingent on a majority vote of those to

be regulated. Pet. App. 8a-9a (citing *Currin v. Wallace*, 306 U.S. 1 (1939), *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939), and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928)).

The court reasoned that under § 2719(b)(1)(A) of IGRA the Governor's decision is itself a contingency and the federal Executive's role is to request, ascertain, and implement the Governor's decision. More specifically, the provision passes constitutional muster, according to the court of appeals, because the federal Executive Branch must ascertain whether the state Governor concurred, and then must approve the application if he did and deny the application if he did not. Pet. App. 7a-8a. This theory of contingent legislation also formed the principal basis for the court of appeals' rejection of petitioners' separation-of-powers argument based on the Appointments Clause. *See* Pet. App. 16a-17a.

The court of appeals rejected as well petitioners' suggestion that § 2719(b)(1)(A)'s provision for a Governor's concurrence or nonconcurrence to control the result of a federal administrative decision "compels state governors to administer federal law in violation of principles of federalism as interpreted in *New York v. United States*, 505 U.S. 144 (1992) and in *Printz v. United States*, 521 U.S. 898 (1997)." Pet. App. 19a. The court distinguished these precedents, stating that "[n]either the States nor their Governors are required to aid the federal administration of § 2719(b)(1)(A) in any way." *Id.* While the court conceded that even a Governor's inaction has an effect under § 2719(b)(1)(A), it concluded that the provision "preserves state sovereignty by merely encouraging the States to decide whether to endorse federal policy and by reserving the ultimate execution of that policy to the federal government." Pet. App. 20a.

Petitioners' other argument with respect to federalism was "that the gubernatorial concurrence provision violates principles of federalism because it impermissibly interferes with the functioning of state government by rearranging its structure." Pet. App. 22a. The court noted petitioners' contention that "when the Secretary of the Interior seeks the concurrence of the Governor of Wisconsin, he or she requires the Governor to legislate Wisconsin's gaming policy in violation of the Wisconsin Constitution." *Id.* The court did not (and could not) suggest that any Wisconsin statute authorizes a Governor to make a decision under § 2719(b)(1)(A) or guides him as to how to do so. It nonetheless stated that in making his determination to concur or not to concur in the Secretary's decision, the Governor "will be informed by the public policy represented by the Wisconsin Constitution and relevant statutes." Pet. App. 23a. On this basis, the court concluded that "[t]he governor's role is not inconsistent with the Wisconsin Constitution, which vests 'the executive power . . . in a governor.'" *Id.* (quoting Wis. Const., Art. V, § 1). The court did not explain how two Governors (Governors Thompson and McCallum) could, consistently with executing the law, take such different approaches to off-reservation gaming under § 2719(b)(1)(A), with the one approving the only application put to him and the other announcing that he would never approve an application and then acting consistently with that statement.

Following the court of appeals' decision, petitioners sought rehearing, relying in particular on the Wisconsin Supreme Court's decision (rendered after the court of appeals' here) in *Panzer v. Doyle*, 271 Wis. 2d 295, 680 N.W.2d 666 (2004). *Panzer*, which concerned the Governor's decisionmaking with regard to another aspect of IGRA, indicated that under Wisconsin law the Governor has no authority to make the decision at issue here. *See infra* p. 23. Although the court of

appeals ordered the government to respond to the petition for rehearing, it denied rehearing on July 19, 2004. Pet. App. 66a.

REASONS FOR GRANTING THE PETITION

Over the past quarter-century, this Court has acted to preserve the constitutional structure of government in two notable respects. First, it has sought to ensure that Congress does not displace the proper role of the Executive Branch in administering the law, whether by arrogating power to itself in ways evident, *see, e.g., INS v. Chadha,* 462 U.S. 919 (1983), or slightly more subtle, *see, e.g., Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), or by attempting to disperse executive authority elsewhere, *see, e.g., Printz v. United States,* 521 U.S. 898, 922-23 (1997). Second, the Court has acted to preserve aspects of state sovereignty even in instances where pressing public policy issues prompted Congress to think it useful to attempt to incorporate the several States into the federal processes of lawmaking, *see, e.g., New York v. United States*, 505 U.S. 144 (1992), or administration, *see, e.g., Printz,* 521 U.S. at 925-33.

Petitioners ask the Court to continue to enforce these principles and hold the gubernatorial-concurrence provision of § 2719(b)(1)(A) unconstitutional. In all events, there can be no substantial debate concerning the provision's extraordinary importance in a politically and economically significant area of public policy, and it is appropriate that, one way or the other, the Court resolve the doubts about its constitutionality. A ruling by this Court further will provide guidance with respect to any structural limits that the Constitution imposes on what is frequently termed "cooperative federalism." All of these points are developed in detail below.

I. BY TRANSFERRING FROM THE SECRETARY OF THE INTERIOR TO A STATE GOVERNOR FINAL SUBSTANTIVE DECISIONAL AUTHORITY IN A FEDERAL ADMINISTRATIVE PROCEEDING, § 2719(b)(1)(A) UNDERMINES THE EXECUTIVE BRANCH'S AUTHORITY TO EXECUTE THE LAWS, IN VIOLATION OF CORE PRINCIPLES OF SEPARATION OF POWERS.

Section 2719(b)(1)(A) of IGRA is incompatible with the Constitution. Specifically, by assigning to a state Governor final substantive decisional authority on an application by an Indian tribe under the federal Indian Gaming Regulatory Act to allow federally regulated gaming on land held in trust by the United States for the tribe's benefit, Congress improperly subordinated the federal Executive's duty under Article II of the Constitution.

One need look no further than the vesting and other clauses of the Constitution to reach this conclusion. Article II provides that "[t]he executive Power shall be vested in a President of the United States of America" and that the President "shall take Care that the Laws be faithfully executed." U.S. Const., Art. II, §§ 1, 3. By contrast, Congress's structuring of § 2719(b)(1)(A) so as to displace the Secretary of the Interior (or some other executive branch officer) from the ultimate critical determinations necessary to approve an application for off-reservation gaming runs afoul of these provisions and the structure of government mandated by the Constitution. Section 2719(b)(1)(A) impermissibly transfers out of the Executive Branch such "executive functions" as "enforc[ing] th[e] [laws] or appoint[ing] the agents charged with the duty of such enforcement." *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (internal quotation marks omitted); *see also Bowsher v. Synar*, 478 U.S. 714, 733

(1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law").

The conclusion that § 2719(b)(1)(A) is unconstitutional is confirmed by recent, specific applications of these textual provisions. For example, in *INS v. Chadha*, 462 U.S. 919 (1983), the Court held that federal executive decisions cannot be overturned by the actions of one house of Congress. *Chadha* reflects the basic proposition that a decision properly entrusted to the Executive Branch can be overturned only by Congress, and only when Congress enacts a law in the manner prescribed by the Constitution. Other efforts by Congress to insert itself, even in indirect ways, into the executive sphere have also been rejected by the Court in recent years. *See, e.g., Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986).

This Court's landmark decision in *Printz v. United States*, 521 U.S. 898 (1997), makes clear that the controlling principle is not whether Congress has sought to aggrandize itself, but rather whether its actions improperly permit *any entity* to invade the sphere of executive authority. *See also Clinton v. Jones*, 520 U.S. 681, 701 (1997) ("We have recognized that '[e]ven when a branch does not arrogate power to itself . . . the separation of powers doctrine requires that a branch not impair another in the performance of its constitutional duties.'") (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)). *Printz* involved the attempt by Congress in 1993 in the Brady Act to require certain state law-enforcement officers to participate in a federal administrative process regulating sales of handguns.

The Court held that, even apart from unlawfully commandeering state officials, *compare infra* Part II (argument concerning federalism here), the challenged portion of the

Brady Act had an impermissible effect upon the constitutional role of the Executive. *See Printz*, 521 U.S. at 922-23. The Court stated that "[t]he Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take care that the laws be faithfully executed,' Art. II, § 3, personally and through officers whom he appoints . . . ." *Printz*, 521 U.S. at 922. The Brady Act, by contrast, "transfer[red] this responsibility" to individuals over whom there was no "meaningful Presidential control." *Id.* The Court held that this was contrary to "[t]he insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability . . . ." *Id.*

Section 2719(b)(1)(A) is of the same nature as the Brady Act and the other congressional enactments in the foregoing cases. This gubernatorial-concurrence provision (in reality, a gubernatorial-veto provision) replaces the federal Executive in the execution of federal law, not with Congress itself or with state law enforcement officials, but with state Governors. These individuals are beyond any control or supervision of the President and, in all events, scarcely are "officers whom he appoints." *Printz*, 521 U.S. at 922. Yet under § 2719(b)(1)(A) of IGRA, the Governor of the State, not the Secretary of the Interior or some other executive branch official, is the individual in whom Congress has reposed the final substantive federal decision. Such a dispersion of authority is incompatible with the notion of a unitary Executive. *Compare* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994), *cited with approval in Printz*, 521 U.S. at 923. It is no wonder that President

Reagan considered an analogous provision in another federal law to be unconstitutional.[3]

In addition to these broader separation-of-powers obstacles, the Appointments Clause of the Constitution also stands in the way of § 2719(b)(1)(A)'s gubernatorial-concurrence provision. "Any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Freytag v. Commissioner*, 501 U.S. 868, 881 (1991) (quoting *Buckley*, 424 U.S. at 126). The Court's decisions make clear that individuals who wield federal power of a discretionary nature—who have the final say on a federal matter—come within this provision. *See Buckley*, 424 U.S. at 126 n.162 (suggesting that individuals are "Officers of the United States" and thus subject to the Appointments Clause if they are "not subject to the control or direction of any other executive, judicial, or legislative authority"); *Freytag*, 501

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[3] The reference is to President Reagan's statement concerning the Columbia River Gorge National Scenic Area Act, Pub. L. 99-663. The President stated as follows:

> In signing this bill, I have grave doubts as to the constitutionality of the provision in Section 10, which would authorize the Governors of Washington and Oregon and the State-appointed Columbia River Gorge Commission to disapprove Federal condemnation actions. The Federal government may not constitutionally be bound by such State action taken pursuant to Federal law. To avoid this unconstitutional interpretation, I am signing this bill with the understanding that State disapproval of a Federal condemnation action under this legislation will not operate as a veto, but will be merely advisory. Upon receipt of a State notice of disapproval, the Federal government will decide whether to proceed with its condemnation action.

Columbia River Gorge National Scenic Area Act, Pub. L. 99-663, *Statement by President of the United States*, *reprinted in* 1986 U.S.C.C.A.N. 6750, 1986 WL 67622.

U.S. at 880-82 (emphasizing that "exercise [of] significant discretion" as opposed to the mere discharge of "ministerial tasks" characterizes "Officers" subject to the Appointments Clause). Under any reading of § 2719(b)(1)(A), there can be no doubt that the Governor, who without question is not appointed in a manner contemplated by the Appointments Clause, exercises significant discretion. This is sufficient for the constitutional provision to apply.[4]

The court of appeals sought to deflect all of these separation-of-powers concerns by analogizing the gubernatorial-concurrence provision to a rarely used subset of the doctrine called "contingent legislation."[5] Specifically, the court held that the constitutional sphere of executive authority is not violated where "Congress restrict[s] the authority to execute federal legislation contingent upon the approval of an actor external to the federal Executive Branch." Pet. App. 8a, citing *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 694-95 (9th Cir.), *cert. denied*, 522 U.S. 1027 (1997).[6] The court thus ruled that it had no difficulty with

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[4] In fact, the Department of Justice opined to Congress in 1988 that a different draft of IGRA under consideration, which authorized Governors and other local officials to approve off-reservation gaming with no role for the Secretary of the Interior, violated the Appointments Clause. S. Rep. No. 446, 100th Cong., 2d Sess., 1988 U.S.C.C.A.N. 3071, 3102, *reprinted in* 1988 WL 169811 at *32. It is difficult to see how inserting the Secretary to serve as a sort of an initial screener and ultimate implementer for the Governor eliminates the problem.

[5] Typically, the phrase "contingent legislation" describes nothing more than Congress's ability to enact legislation that can be implemented upon a finding by the Executive that specified facts exist. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), established the principle. There, the Court upheld a statute that required the President to adjust tariffs on imported barium dioxide upon a finding that the pre-existing tariff did not compensate for differences in production costs between domestic and foreign producers.

[6] In *Siletz Indians*, the Ninth Circuit turned back a separation-of-powers challenge to § 2719(b)(1)(A). Its opinion did not have the benefit

Congress's reducing the federal Executive's role in the execution of a law to the mechanical act of requesting and implementing a decision rendered by a non-executive-branch official, even where (as under § 2719(b)(1)(A)) that official is deciding a matter that has *already* been decided by the Executive, *see supra* p. 7 n.2.

This is an extraordinary expansion of the concept of contingent legislation. Under this approach, the Secretary's ascertainment and implementation of the Governor's disposition of the Secretary's determination are indistinguishable from any other fact that a statute requires an executive official to find as a predicate to the execution of a law. This represents a sharp break with the Court's separation-of-powers jurisprudence. If allowed, Congress can employ "contingent legislation" to rearrange the constitutional allocation of powers among the three branches.

Contrary to this approach, the subset of this Court's contingent legislation precedents invoked by the Seventh Circuit here and the Ninth Circuit in *Siletz Indians* in fact consist of a handful of cases upholding statutes that condition the Executive's application of certain economic regulation on a vote of those to be regulated. *Currin v. Wallace*, 306 U.S. 1 (1939), is frequently regarded as involving a representative example of this type of statute. *See, e.g.*, Pet. App. 8a-9a; *Siletz Indians*, 110 F.3d at 695. In *Currin*, the Court upheld a federal statute authorizing the Secretary of Agriculture to designate markets for the sale of tobacco, but only if two-thirds of affected tobacco farmers favored the designation. *See Currin*, 306 U.S. at 6, 15-16. *See also United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 577 (1939) (upholding provision conditioning Secretary of Agriculture's

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of this Court's subsequent decision in *Printz*, and the Ninth Circuit was not presented with a federalism argument along the lines of Part II of this petition.

power to issue marketing orders upon the contingency of vote of producers); *Wickard v. Filburn*, 317 U.S. 111, 116 (1942) (permitting Secretary of Agriculture's imposition of quotas conditioned on a referendum where two-thirds "of farmers who will be subject to the quota" approved it). These cases variously allow certain economic regulation contingent on a favorable vote of the regulated entities. The statutes at issue did not raise separation-of-powers problems because they codified a species of self-regulation by a majority or super-majority vote of the regulated group.

That *Currin* cannot stand for a broader theory of contingent legislation, such as the one articulated by the court of appeals here, was demonstrated by the Solicitor General in *Chadha*. In *Chadha*, the Senate suggested that the one-house-veto provision was valid because *Currin* allowed unbridled contingent legislation. *See, e.g.*, Brief of United States Senate in *Chadha*, n.12 ("It seems difficult to believe that the effectiveness of action legislative in character may be conditioned upon a vote of farmers but may not be conditioned on a vote of the two legislative bodies of the Congress.") (internal quotation marks and emphasis omitted) (available at 1981 WL 388494 at *12 and in LEXIS at 1980 U.S. Briefs 1832, doc. no. 20). The Solicitor General responded by analogizing the statute at issue in *Currin* to one creating a condition that the payment of benefits is contingent upon an application of the beneficiary. According to the Solicitor General, the farmers were beneficiaries of the act of Congress. Under this reading, *Currin* reflects merely that Congress has the authority to "impose certain conditions on the receipt of benefits under a law," although it may not "impose [an] *unconstitutional* condition." Brief of Solicitor General for INS in *Chadha*, n.36 (available at 1982 WL 607220 at *56 and in LEXIS at 1980 U.S. Briefs 1832, doc. no. 7).

Here, of course, Governors are not the beneficiaries of off-reservation gaming applications; the applicant tribes are. In fact, the interests of a Governor of a State and Indian tribes within the State differ and often conflict. Indians are a distinct racial and political minority in the statewide electorate to which a Governor is accountable.[7] The provision in § 2719(b)(1)(A) thus is more accurately seen as an example of a delegation of authority to a person outside the federal government to regulate the activities of others than it is seen as analogous to the self-regulation sort of provisions upheld in *Currin* and its few kin.

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[7] The decision by Congress to empower state Governors as final substantive decisionmakers is particularly vexatious for this reason. The United States has a well-recognized trust obligation in its relationship with Indians. *See Morton v. Mancari*, 417 U.S. 535, 551-53 (1974) (and cases cited). Historically, Congress protected Indians from the divergent interests and even hostility of local officials. *See, e.g., United States v. Kagama*, 118 U.S. 375, 383-84 (1886); *Worcester v. Georgia*, 31 U.S. 515, 561-62 (1832). By contrast, Governors do not have any trust obligations and in fact are answerable at the polls to individuals whose interests (particularly as historically assessed) may be adverse to Indians in the area. Moreover, Wisconsin's Governor, as in many States, has a conflict of interest. He is charged with managing a state gaming operation (a lottery) in direct competition with Indian gaming. In these circumstances, it is difficult to see how Governors can act as trustees for federal Indian policies.

It is worth noting as well that the approach at issue here is not deployed elsewhere in IGRA. Under §2719(b)(1)(A), the Governor is for all practical purposes the final decisionmaker on any off-reservation gaming application that the federal government has otherwise approved. By contrast, in another section of IGRA, authorizing Class III gaming if there is a tribal compact with the State, the federal government remains the final decisionmaker. Specifically, all compacts must be approved by the Secretary of the Interior, a federal officer who has a trust obligation to Indians, and if a State refuses to negotiate a compact, the Secretary can impose its equivalent (i.e., she can prescribe conditions under which Class III gaming is permitted). *See* 25 U.S.C. § 2710(d)(7)(B)(vii), (8).

In all events, there can be no suggestion after *Chadha* that legislation may be contingent on some *unconstitutional* contingency. *Compare Chadha*, 462 U.S. at 987 (White, J., dissenting) (calling into question whether *Currin* survives the decision in *Chadha*). Yet the court of appeals' expansion of the concept of contingent legislation effectively allows Congress to create a contingency that rearranges federal separation-of-powers principles. *Compare Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (Stevens, J.) (post-*Chadha* decision striking down congressional act based on separation of powers where the act imposed an unconstitutional condition). The court of appeals' approach leaves a statute's constitutional validity dependent on style rather than substance. This cannot be. As the Court of Appeals for the D.C. Circuit explained, in a decision which preceded *Chadha* and was summarily affirmed by this Court after *Chadha* and which specifically rejected a broad expansion of this contingent legislation doctrine, "[m]erely styling something as a condition on a grant of power does not make that condition constitutional." *Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 470 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

In short, the Court's precedents recognize a more robust constitutional role for the Executive than that contemplated by § 2719(b)(1)(A). And the court of appeals' expansion of the notion of contingent legislation cannot obscure the matter or provide a roadmap around the Executive. The proposition that the federal Executive's constitutional duties can be reduced to mechanical implementation of the executive decisions of others beyond the Executive's control so long as the statute at issue styles the approval of others as a condition is, simply put, not the law.

The Court should resolve these separation-of-powers questions. Over the past several decades, many statutory programs have demonstrated Congress's "increasing willingness to allow states to superintend the implementation of federal law." Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 672 (2001). The Court has upheld these statutes where Congress has gone about this in a constitutional manner, such as "attach[ing] conditions on the receipt of federal funds," *South Dakota v. Dole*, 483 U.S. 203, 206 (1987), and (in instances where Congress has the authority to regulate private activity under the Commerce Clause) offering States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation, *see, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288-89 (1981). But where such statutes have interfered with the separation of powers, *see Printz*, 521 U.S. at 922-23, or federalism (*see infra* Part II and cases cited), the Court has struck them down. What all the decisions share in common is that each has been important to guiding future legislation.

Thus, quite apart from petitioners' view that the challenged statute violates the Constitution, a decision of this Court, one way or the other, addressing the expansion of the contingent legislation doctrine here will help ensure that future legislation is within constitutional guideposts. *Compare Metropolitan Washington Airports Auth.*, 501 U.S. at 277 (striking down congressionally created airport board on separation-of-powers grounds and noting importance of doing so in order to deter Congress from resorting to "similar expedients," for "[a]s James Madison presciently observed, the legislature 'can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments'") (quoting The Federalist No. 48, p. 334 (J. Cooke ed. 1961)).

II. BY MAKING A STATE GOVERNOR THE FINAL DECISIONMAKER ON AN OFF-RESERVATION GAMING APPLICATION, CONGRESS HAS REARRANGED THE STRUCTURE OF STATE GOVERNMENT AND INTERPOSED A STATE CONSTITUTIONAL OFFICER IN A FEDERAL DECISION, IN VIOLATION OF PRINCIPLES OF FEDERALISM.

Congress, in authorizing off-reservation gaming on after-acquired trust land, has made state Governors the final substantive decisionmakers in federal administrative proceedings. Quite apart from unconstitutionally encroaching upon the authority of the federal Executive, this approach of IGRA in § 2719(b)(1)(A) rearranges the workings of state governments in a manner beyond the federal government's authority. The federal government also lacks authority thus to interpose Governors in a federal administrative decision.

The State of Wisconsin, like other States and the federal government, divides governmental authority among three branches of government: the legislature, the executive, and the judiciary. *See* Wis. Const., Arts. IV, V, VII; *Panzer v. Doyle*, 271 Wis. 2d 295, 331, 680 N.W.2d 666, 684 (2004). The legislative branch makes the general policy decisions for the State, which thereupon are carried into effect by the executive branch. *See generally State ex rel. Davern v. Rose*, 140 Wis. 360, 363-64, 122 N.W. 751, 752-53 (1909). In the words of another state supreme court, whose decision is otherwise relevant as well (*see infra* p. 23 n.10), such separation of powers is "a principle that is fundamental in the structure of the federal government and the governments of all fifty states." *State ex rel. Clark v. Johnson*, 120 N.M. 562, 573, 904 P.2d 11, 22 (1995).

The Wisconsin legislature has never enacted a general policy for the State on off-reservation gaming or delegated to

the Governor any authority to do so.[8] This lack of state authority is clear in light of the Wisconsin Supreme Court's decision in *Panzer v. Doyle*, 271 Wis. 2d 295, 680 N.W.2d 666 (2004), rendered after the court of appeals' decision here. *Panzer* stated that, absent Wis. Stat. § 14.035, which delegates certain authority to the Governor to enter into compacts with Indian tribes for gaming,[9] the Governor would lack any authority to make such compacts. *See Panzer*, 271 Wis. 2d at 338-39, 680 N.W.2d at 687-88.[10] And § 14.035 is not some broad-ranging authority to approve Indian gaming, but simply gives the Governor authority, "on behalf of this state, [to] enter into [a] compact that has been negotiated under 25 USC 2710(d)." Wis. Stat. § 14.035. Section 2710(d) concerns the *type* of gaming that will be permitted.

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[8] Indeed, § 2719(b)(1)(A) has created tension between the legislature and the Governor in Wisconsin. Two Wisconsin legislatures tried to take this federally granted power from the Governor. The legislature was unable to overcome the vetoes of two Governors (Thompson and Doyle).

[9] IGRA empowered "State[s]" to enter into compacts with tribes. *See, e.g.*, 25 U.S.C. § 2710(d)(1)(C) (permitting Class III gaming activities on Indian lands where, *inter alia*, activities are "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State"). In Wisconsin, the legislature delegated this state authority to the Governor. *See* Wis. Stat. § 14.035. However, the federal government is the final decisionmaker on any compact. *See supra* p. 19 n.7.

[10] This aspect of *Panzer* comports with other decisions involving other States. *See Panzer*, 271 Wis. 2d at 337-39, 680 N.W.2d at 687-88 (citing cases). Indeed, the supreme court of one State concluded, with respect to a suggestion that its Governor "possesses the authority, as a matter of *federal law*, to bind the State to the terms of the compact, irrespective of whether he has the authority as a matter of state law," that such an argument is "inconsistent with core principles of federalism." *State ex rel. Clark v. Johnson*, 120 N.M. 562, 577, 904 P.2d 11, 26 (1995). It thus refused to interpret § 2710(d) of IGRA along these lines and further stated that it was "confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state gubernatorial power." *Id.*

By contrast, there is *no* provision in the Wisconsin Statutes, analogous to § 14.035, that authorizes the Governor to enter into agreements or in any way treat questions concerning the advisability of permitting off-reservation gaming under § 2719(b)(1)(A). In short, Wisconsin law does not authorize the Governor to act upon, approve, or concur in the matters embraced by § 2719(b)(1)(A).

Despite this absence of authority from the source where one would expect a Governor to receive authority (*viz.*, the constitution and the statutes of the State), Congress through § 2719(b)(1)(A) has cast the Governor as the maker of the final substantive decision in a federal administrative decisional process. Precisely how the Governor is supposed to make his determination is not a matter of agreement. One possibility is that the Governor is required simply to undertake the same factual inquiry as that already made by the Secretary of the Interior and may not consider other issues. This is the most natural reading of the statute, and it is the interpretation adopted by the twenty States that appeared as *amici* here in the court of appeals. *See supra* p. 7 n.2. It used to be the interpretation of the United States as well, but the federal government in this case has abandoned that position in favor of another suggestion: specifically, that the Governor is bound by *no* standard.[11] The court of appeals adopted yet another interpretation, even though it was urged upon the court by no party or *amicus* and is apparently supported by nothing in the text of the statute. Specifically, the court held that the Governor's role is to determine whether an off-reservation gaming proposal complies with

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[11] *Compare* Brief for the Federal Respondents in Opposition, at 9, *Confederated Tribes of Siletz Indians v. United States*, U.S. Sup. Ct. No. 97-449 (filed Nov. 10, 1997), *with* Brief for the Federal Appellees, at 25 n.10, *Lac Courte Oreilles Band v. United States*, 7th Cir. No. 03-2323 (dated Oct. 14, 2003).

generalized state policy reflected in the State's laws on gaming. *See supra* p. 10; Pet. App. 23a.

The foregoing interpretive differences are immaterial here, for under each of these interpretations the statute suffers from the same constitutional flaw: by authorizing a Governor of a State to approve off-reservation gaming, under any or no standard, § 2719(b)(1)(A) rearranges authority within the State's government. For example, in Wisconsin (as in most States), commercial gaming is heavily regulated pursuant to the criminal laws, and a principal state constitutional power of Governors is to execute the laws of the States. However, when Indian gaming is authorized pursuant to IGRA, state criminal law is pre-empted by a different provision of IGRA. *See* 18 U.S.C. §§ 1166(c), (d). Thus, the effect of a gubernatorial concurrence under § 2719(b)(1)(A) is to exempt certain areas of the State from the State's criminal statutes, even though Governors, simply said, have no state authority to exempt criminal conduct but rather possess the duty to enforce the law. The result of all this is that approval of off-reservation gaming will vary, not only according to other factors, but according to the views of the occupant of the Governor's office. Thus, in Wisconsin, one Governor (Governor Tommy Thompson) approved off-reservation gaming in Milwaukee pursuant to IGRA, while a second Governor (Governor Scott McCallum) disapproved of off-reservation gaming pretty much altogether, including in this case, and there is a third (the current Governor, James Doyle) whose position on off-reservation gaming is unknown.

In all events, Congress has drafted into federal service, to make what will become the final federal agency decision, whoever happens to be Governor of a State at the time when the Secretary of the Interior makes a favorable two-part factual determination pursuant to § 2719(b)(1)(A). Under the structure of § 2719(b)(1)(A), this is the practical result even if the Governor refuses to be involved in the matter, for then the

concurrence required to permit off-reservation gaming has been withheld and the application will necessarily be denied under § 2719(b)(1)(A).

The federal government has no authority to go about its business in this manner.[12] This essential point, while perhaps little commented upon because it falls into the category of "truths . . . so basic that, like the air around us, they are easily overlooked," *compare New York v. United States*, 505 U.S. 144, 187 (1992), is reflected in a variety of respects in this Court's precedents. Although the Court has stated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), in overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), that Congress has substantial power under the Commerce Clause to compel States to adhere to federal policies of general application (such as minimum wage and overtime rules), the Court has never held that Congress has the power to select a constitutional officer of a State and require him, willing or not, to make what amounts to a federal executive decision. Indeed, *Garcia* itself recognizes that there are limits to congressional authority over the States under the Commerce Clause. *See Garcia*, 469 U.S. at 555-57.

Subsequent opinions of the Court have limited the ability of Congress to regulate States when the regulation impairs a core attribute of state sovereignty. For example, the Court held in *Alden v. Maine*, 527 U.S. 706 (1999), that Congress could not abrogate a State's sovereign immunity to allow suit

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[12] Nor does it typically do so, as even IGRA itself reflects in another provision, which empowers "State[s]" to enter into compacts. *See supra* p. 23 n.9. Indeed, in *Testa v. Katt*, 330 U.S. 386, 394 (1947), the Court apparently recognized that state institutions can only be used to decide a federal matter if the matter is within "the state institution's own decisionmaking structure and method." *FERC v. Mississippi*, 456 U.S. 742, 773-74 n.4 (1982) (Powell, J., concurring in part and dissenting in part). *Accord id.* at 760 (opinion of the Court).

against the State in the State's own courts. In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the Court questioned whether Congress has the authority under the Commerce Clause to determine the qualifications of state policymakers (at issue was an apparent conflict between the federal Age Discrimination in Employment Act and a mandatory retirement provision contained in the Missouri Constitution).[13] The Court observed in *Gregory* that "[t]hrough the structure of its government . . . a State defines itself as a sovereign." *Id.* at 460; *see also Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."). And, of course, the Court has held that Congress does not have the authority to direct state legislatures to make certain policy decisions, *see New York v. United States*, 505 U.S. 144 (1992), or to commandeer local officials into federal service, *see Printz v. United States*, 521 U.S. 898 (1997).

These cases share a common premise. Congress cannot utilize its Commerce Clause authority to strip States of core attributes of state sovereignty. In the case at bar, the core attribute of state sovereignty involves the basic manner by which a State separates the powers of the various branches of its government. Under § 2719(b)(1)(A) of IGRA, as a matter of federal law, Governors make fundamental policy deci-

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[13] The Court held in *Gregory* that the determination of Congress to apply the federal Age Discrimination in Employment Act to state policymakers was unclear and that, absent clear congressional direction, the Court would not interpret the statute to apply to state policymakers (there, judges). *Gregory*, 501 U.S. at 457-70. The Court noted, even beyond this, that "[a]s against Congress' powers '[t]o regulate Commerce . . . among the several States,' U.S. Const., Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate," *Gregory*, 501 U.S. at 464, but its interpretation of the statute meant that the Court did not need to resolve that matter.

sions. There is absolutely no state legislative involvement in these decisions. Thus, far from involving a grant of authority *to the State* (*compare* p. 23 n.9), this case involves a direct federal empowerment of one state constitutional officer who, absent the congressional authorization, would not have the authority under state law to make the decision at issue or one resembling it. In these circumstances, this case presents a more fundamental question even than *Printz* concerning the authority of Congress pursuant to the Commerce Clause to deploy state officials: *Printz* did not involve the powers of a state constitutional officer and did not involve displacing the state legislature's authority to make policy.

Since the power of Congress, pursuant to the Commerce Clause, is broad, if Congress can employ state executive officers in this manner, a limit on the power of Congress to remake the governments of the States for purposes of administering federal law and, in particular, to avoid state legislatures altogether in programs of "cooperative federalism" scarcely suggests itself. Petitioners submit that Congress does not have this authority and that § 2719(b)(1)(A) violates core principles of federalism.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-2323

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, AND SAKAOGON CHIPPEWA COMMUNITY, MOLE LAKE BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, GALE A. NORTON, Secretary of the Department of the Interior, *et al.*,

Defendants-Appellees,

JAMES E. DOYLE, Governor of the State of Wisconsin and STATE OF WISCONSIN,

Intevening Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Wisconsin. No. 02 C 553
BARBARA B. CRABB, *Chief Judge*

Argued January 16, 2004
Decided April 29, 2004

Before FLAUM, *Chief Judge*, and RIPPLE and ROVNER, *Circuit Judges*.

FLAUM, *Chief Judge*. The Plaintiff Tribes appeal the district court's opinion and order declaring the gubernatorial concurrence provision of the Indian Gaming Regulatory Act ("IGRA") constitutional and not in violation of the federal government's trust obligation to Indians. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I. Background

Plaintiffs are three federally-recognized Indian Tribes with reservations in sparsely populated areas of northern Wisconsin ("the Tribes"). While each of the Tribes operates a casino on reservation land, these casinos do not generate income comparable to casinos operated by tribes who have reservations near Wisconsin's urban centers or destination resorts. Seeking to advance their tribal and economic development, the Tribes joined together for the purpose of establishing a jointly owned and operated off-reservation gaming facility in a lucrative location.

The Tribes found a struggling pari-mutuel greyhound racing facility in Hudson, Wisconsin that they wished to acquire and convert into a casino gaming facility. Hudson was attractive to the Tribes because they believed its proximity to the metropolitan areas of Minneapolis and St. Paul and easy accessibility to Interstate Highway 94 would ensure a broad customer base. In October 1992 the Tribes formally submitted their application under the Indian Gaming Regulatory Act ("IGRA") 25 U.S.C. §§ 2701 *et seq.* to the Department of the Interior seeking to have the Hudson property taken into trust for their benefit for the purpose of operating a casino gaming facility.

The Secretary of the Interior has broad discretion to acquire lands in trust for the benefit of Indian tribes pursuant to Indian Reorganization Act of 1934, 25 U.S.C. § 465. However, this authority is limited by IGRA, which prohibits

certain types of gaming on lands acquired in trust by the Secretary of the Interior after October 17, 1988 ("after-acquired lands"). 25 U.S.C. § 2719(a). The Tribes hoped that their application would be favorably received pursuant to 25 U.S.C. § 2719(b)(1)(A), an exception to IGRA's general ban on gaming on after-acquired lands. That exception provides that the general prohibition on gaming shall not apply where:

> the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

25 U.S.C. § 2719(b)(1)(A).

The Department of the Interior initially denied the Tribes' application, but later vacated the rejection following a lawsuit and settlement. In February 2001, the Department of the Interior issued findings that the proposal was in the best interests of the Tribes and would not be detrimental to the surrounding community. The Department of the Interior sent the matter to then Governor of Wisconsin Scott McCallum for his concurrence. In May 2001, Governor McCallum issued a letter declining to concur in the Secretary's findings, citing Wisconsin's general disapproval of off-reservation gaming and public policy of permitting only "limited exceptions to the general prohibition against gambling." Governor McCallum opined that the public interest would not be served by the addition of another major casino gaming facility to the seventeen casino gaming facilities already operating in Wisconsin. In June 2001, the Department of the Interior issued a final decision denying the Tribes' application on the grounds that, absent the Governor's concurrence, the exception pro-

vided in 25 U.S.C. § 2719(b)(1)(A) did not apply and 25 U.S.C. § 2719(a) precluded the acquisition of the land for the purposes of gaming.

The Tribes initiated this litigation in the United States District Court for the District of Columbia in May 2001 seeking a declaration that the gubernatorial concurrence provision of § 2719(b)(1)(A) was unconstitutional. The State of Wisconsin and Governor McCallum moved to intervene in July 2001. The Tribes moved for judgment on the pleadings in December 2001. The case was eventually transferred to the United States District Court for the Western District of Wisconsin in October 2002. The Tribes renewed their motion for judgment on the pleadings in November 2002, and both defendants filed cross-motions for judgment on the pleadings.[1] The Tribes filed an opposition to the defendants' motions in addition to a "conditional motion" to file a second amended complaint. The conditional motion requested that the Tribes be permitted to add a claim that Governor McCallum had relied on improper factors in refusing to concur, in the event that the court upheld the constitutionality of the gubernatorial concurrence provision of § 2719(b)(1)(A).

In April 2003, the district court granted the defendants' motions for judgment on the pleadings, finding that the gubernatorial concurrence provision is not an unconstitutional delegation of power, nor does it violate the separation of powers doctrine, the Appointments Clause, Art. II, § 2, or the Tenth Amendment. Further, the district court found that the Tribes' claim that the gubernatorial concurrence requirement represented a breach of trust was barred by sovereign immunity and was without support in law. Finally, the district court denied the Tribes' conditional motion to amend, stating that it was untimely and futile. The district court subsequently de-

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[1] James E. Doyle, the current Governor of Wisconsin, was substituted for Governor McCallum as the intervening defendant.

nied the Tribes' Rule 59 motion to vacate the judgment and the Tribes now appeal. We uphold the judgment of the district court because we conclude that § 2719(b)(1)(A) does not violate separation of powers principles, the nondelegation doctrine, the Appointments Clause, principles of federalism, or the federal government's trust obligations to Indians.

II. Analysis

The Tribes challenge the constitutionality of the gubernatorial concurrence provision of the Indian Gaming Regulations [*sic*] Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(A) on multiple grounds. The constitutionality of a federal statute is an issue of law subject to *de novo* review. *United States v. Hausmann*, 345 F.3d 952, 958 (7th Cir. 2003). When "it is fairly possible [,]" this Court is "to interpret the statute in a manner that renders it constitutionally valid." *Communications Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988).

Following the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that Congress had not yet expressly granted the States jurisdiction to enforce state civil gaming regulations on Indian reservation land, Congress passed IGRA for the purpose of creating a federal regulatory scheme for the operation of gaming on Indian lands. 25 U.S.C. § 2702. IGRA states that the operation of gaming by Indian tribes is to serve "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA recognizes that the States have an interest in the regulation of gaming on Indian lands within their borders and allows state regulation of Indian gaming in two ways: (1) state criminal laws that prohibit gaming are enforceable on tribal lands, *see* 25 U.S.C. § 2701(5), and (2) Indian tribes who choose to engage in Class III gaming may

do so only pursuant to a Tribal-State compact, *see* 25 U.S.C. § 2710(d)(1).[2]

At issue in this litigation is § 2719(b)(1)(A), which allows the Secretary of the Interior to deviate from IGRA's general prohibition of gaming on after-acquired lands if certain prerequisites are met. Under § 2719(b)(1)(A), the Secretary of the Interior may take land not contiguous to the reservation of the applicant Indian tribe into trust for the purpose of operating a gaming establishment if the Secretary finds that two factual predicates exist, namely, whether (1) "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members," and (2) "would not be detrimental to the surrounding community," and if the "Governor of the State in which the gaming activity would be conducted" concurs in the Secretary's favorable determination. 25 U.S.C. § 2719(b)(1)(A).

A.

The Tribes assert that the gubernatorial concurrence provision of § 2719(b)(1)(a) violates the separation of powers doctrine because it prevents the Executive Branch from executing the laws. In their view, § 2719(b)(1)(A) unconstitutionally diverts to the Governors of the 50 States the final decisional authority delegated by IGRA to the Secretary of the Interior. The Tribes submit that § 2719(b)(1)(A) requires a governor to review the Secretary of the Interior's analysis of the two factual predicates and empowers the governor to "veto" the Secretary of the Interior's conclusion by

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[2] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) held that 25 U.S.C. § 2710(d)(7), which purported to authorize an Indian tribe to bring suit in federal court to compel a State to negotiate in good faith toward the formulation of a Tribal-State compact, violated the Eleventh Amendment. The Supreme Court held that the Indian Commerce Clause does not grant Congress the power to abrogate the States' sovereign immunity from suit. *Id.* at 48.

withholding concurrence. The Tribes cite *INS v. Chadha*, 462 U.S. 919 (1983) for the proposition that Congress cannot confer upon itself or an actor external to the federal Executive Branch the power to veto the President's execution of federal law.

At issue in *Chadha* was Section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2), which authorized either House of Congress, by resolution, to veto the Attorney General's decision to suspend the deportation of a particular alien. The Supreme Court noted that the one-house veto served an "essentially legislative . . . purpose and effect," *id.* at 952, and was therefore subject to the procedural requirements for enacting legislation set forth in the Constitution: bicameral passage, U.S. Const. art. I, § 1, and presentment to the President, U.S. Const. art. 1, § 7, cl. 2. *Chadha*, 462 U.S. at 954-55. The Supreme Court concluded that none of the "four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President's veto" applied to § 244(c)(2), and therefore concluded that the House of Representatives lacked authority under the Constitution to veto the Attorney General's decision to suspend the petitioner's deportation. *Id.* at 956-57. Finally, the *Chadha* Court noted that to maintain the separation of powers, "the carefully defined limits on the power of each Branch must not be eroded." *Id.* at 958.

Unlike the one-House veto provision at issue in *Chadha*, the gubernatorial concurrence provision does not prevent the Executive Branch from accomplishing its delegated function under IGRA. Section 2719(b)(1)(A) assigns the Secretary of the Interior two responsibilities: (1) to evaluate whether gaming on the proposed trust land would be in the best interest of the applicant tribe and not detrimental to the surrounding community; if so, then (2) to ascertain whether the Governor of the State where the proposed trust land is

located concurs with his or her favorable determination. A governor's concurrence is no less a precondition to the Executive Branch's authority to waive IGRA's general prohibition of gaming on after-acquired lands than are the factual circumstances that give rise to Secretary of the Interior's conclusion that gaming on the proposed trust land would be in the Indian tribe's best interests and would not be detrimental to the surrounding community. Unless and until the appropriate governor issues a concurrence, the Secretary of the Interior has no authority under § 2719(b)(1)(A) to take land into trust for the benefit of an Indian tribe for the purpose of the operation of a gaming establishment.

The power delegated to the Attorney General in *Chadha* had no similar contingency predicate to the Attorney General's statutory authority to execute the law. The one-House veto wrested final decision-making power away from the Executive Branch over an issue that had been legislatively entrusted to the Attorney General and thereby directly impeded the Attorney General from accomplishing the function delegated: to determine whether to suspend, and to suspend, the deportation of a particular alien. In contrast, after the two preconditions to the Secretary of the Interior's authority are met—i.e., the two factual predicates exist and the governor issues a concurrence–the Secretary of the Interior's decision to execute § 2719(b)(1)(A) by taking the proposed land into trust is not subject to review.

We agree with the Ninth Circuit that § 2719(b)(1)(A) is an example of contingent legislation, wherein Congress restricted the authority to execute federal legislation contingent upon the approval of an actor external to the federal Executive Branch. *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 694-95 (9th Cir. 1997). As the Supreme Court established in *Currin v. Wallace*, 306 U.S. 1, 15 (1939), Congress may place "a restriction upon its own regulation by withholding its opera-

tion" unless a specified percentage of those affected by the regulation agree to submit to it. In *Currin*, the Supreme Court upheld a federal statute that authorized the Secretary of Agriculture to designate markets for the sale of tobacco, but only if two-thirds of affected tobacco growers favored the designation. *See also United States v. Rock Royal Co-Op.*, 307 U.S. 533, 577-78 (1939) (upholding provision conditioning Secretary of Agriculture's power to issue marketing orders contingent upon vote of producers); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928). Moreover, Congress may condition the operation of federal law on the approval of a state official. *See Parker v. Richard*, 250 U.S. 235 (1919) (upholding provision that conditioned the conveyance of certain Indian lands upon the approval of a state court). As in *Currin*, where the Secretary of Agriculture's authority was conditioned on a favorable vote of the affected farmers, the Secretary of the Interior's authority to act is conditioned on the concurrence of the relevant governor. This condition does not impermissibly interfere with the Executive Branch's execution of federal law, so much as its occurrence is a prerequisite to the Executive Branch's authority to act pursuant to § 2719 (b)(1)(A).

The Tribes contend that the contingent legislation rationale is an inappropriate analogy to § 2719(b)(1)(A) because that Section empowers governors to impose the force of law on Indian Tribes, who they characterize as "unwilling third parties," whereas contingent legislation typically empowers the decision-maker to submit only itself to regulation. We agree with the Tribes that the statutes upheld in *Currin* and *Rock Royal* conditioned the power of the federal Executive on the approval of those subject to the proposed regulation, but we also conclude that the gubernatorial concurrence provision conditions the Secretary of the Interior's power on the approval of the appropriate party.

According to the Tribes, § 2719(b)(1)(A) regulates Indian tribes with reservations encompassed by the state where the proposed trust land is located. We disagree. The object of regulation under § 2719(b)(1)(A) is land that the Secretary of the Interior has taken into trust for Indians for the purpose of operating a gaming establishment. Before the land is taken into trust, it is within the jurisdiction of a state and is not yet subject to federal regulation under IGRA. Therefore, while the Secretary of the Interior investigates whether gaming on the proposed trust land "would be in the best interest of the Indian tribe" and "would not be detrimental to the surrounding community," the proper spokesperson for the land in question is necessarily a representative of the state where the land is located. It is only after the Secretary of the Interior determines that the proposed trust land meets the factual requirements of § 2719(b)(1)(A), the governor issues a concurrence, and the Secretary executes the federal law by taking the land into trust, that the Tribe enjoying that trust land becomes its appropriate representative. Thus, conditioning the Secretary of the Interior's power on the assent of the relevant governor is not unlike the contingent legislation in *Currin*, in that the proper spokesperson of the object of regulation—the land—is empowered to invite, or refuse, federal regulation.

We find that the remaining separation of powers issues illustrated by the one-House veto in *Chadha* are not present here. The gubernatorial concurrence provision does not aggrandize the power of the Legislative Branch at the expense of the Executive Branch. The Secretary of the Interior would have no authority to permit gaming on after-acquired trust lands absent the power delegated by Congress in IGRA. Congress may, consistent with the doctrine of separation of powers, condition that delegation on the approval of an actor external to the Executive Branch. *See Currin*, 306 U.S. at 1. Congress has not wrongfully enhanced its power by the use of the contingent legislation mechanism; whether the governor

concurs and thereby triggers the Secretary of the Interior's power under § 2719(b)(1)(A) is a circumstance outside of Congress's influence or control. *See Morrison v. Olson*, 487 U.S. 654, 694 (1988) (holding that the independent counsel provisions of the Ethics in Community Government Act do not violate separation of powers principles by impermissibly interfering with the functioning of the Executive Branch, when "Congress retained for itself no powers of control or supervision over an independent counsel").

Finally, the Tribes argue that § 2719(b)(1)(A) violates the separation of powers doctrine because it transfers control over the execution of federal law from the Executive Branch to the Governors of the 50 States, citing *Printz v. United States*, 521 U.S. 898 (1997). In *Printz*, at issue were certain interim provisions of the Brady Handgun Violence Prevention Act ("Brady Act"), 18 U.S.C. § 922, which obliged state law enforcement officers to conduct background checks of prospective handgun purchasers until a national system became operative. *Id.* at 903. The Supreme Court held that the interim provisions unconstitutionally transferred the responsibility of the President to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, to the law enforcement officers of the 50 States, "who are left to implement the program without meaningful Presidential control." *Id.* at 922. The *Printz* Court noted that, by accomplishing the execution of the law through state officers, Congress had denigrated the President's power by circumventing the Executive Branch and had weakened the accountability and vigor of that Branch. *Id.*

Unlike the Brady Act's requirement that state officers temporarily execute federal law by performing background checks, the gubernatorial concurrence provision does not require or even permit any governor to execute federal law. The execution of § 2719(b)(1)(A) occurs when the Secretary of the Interior takes land into trust for the benefit of Indians

for the purpose of operating a gaming establishment. IGRA does not empower any governor to perform that function. For example, even if a governor believed that taking land into trust for an Indian tribe for the purpose of gaming "would be in the best interest of the Indian tribe" and "would not be detrimental to the surrounding community," if the Secretary of the Interior disagreed, the governor would be unable to execute § 2719(b)(1)(A) by taking the land into federal trust.

As only the Secretary of the Interior may execute the § 2719(b)(1)(A) exception to IGRA's general prohibition of gaming on after-acquired land, the Executive Branch retains control over IGRA's execution, and therefore there is no *Printz* separation of powers problem. In conclusion, we hold that the contested provision of IGRA does not violate the separation of powers doctrine by interfering with the Executive Branch's execution of federal law.

B.

We now turn to the Tribes' argument that Congress violated a related branch of the separation of powers jurisprudence: the nondelegation doctrine. In the Tribes' view, if § 2719(b)(1)(A) does not require a governor to decide whether to concur based on his or her analysis of the two factual predicates that bind the Secretary of the Interior's determination, but instead directs each governor to select any standard on which to base the decision, then Congress has abdicated its duty to guide the execution of the law. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (*quoting J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (stating that Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform"). According to the Tribes, Congress failed to adequately constrain the discretion of the Governors, and § 2719(b)(1)(A) therefore requires the Governors to establish Congressional policy, in violation of U.S. Const. Art. 1, § 1.

The Supreme Court has explained that the nondelegation doctrine generally prohibits Congress from delegating its legislative power to another Branch of the federal government. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). We conclude that the nondelegation doctrine is not implicated by the provision at issue because § 2719(b)(1)(A) does not delegate any legislative power to the Governors of the 50 States. When Congress enacts contingent legislation, it does not "abdicate, or . . . transfer to others, the essential legislative functions with which it is vested by the Constitution, U.S.C.A. Art. 1, sec. 1." *Currin*, 306 U.S. at 15. There is no "delegation of legislative authority" to the actor whose assent is a precondition to the execution of the law. *Id.* ("So far as growers of tobacco are concerned, the required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation . . . unless two-thirds of the growers voting favor it.") (citations omitted).

Congress exercised its legislative authority by enacting IGRA's general prohibition of gaming on after-acquired land, creating an exception to that rule in § 2719(b)(1)(A), and dictating the prerequisites for the application of that exception. A governor does not enact federal policy by issuing a concurrence, but instead merely waives one legislatively enacted restriction on gaming. Nor does a governor impact federal policy by declining to concur; in that event, IGRA's policy of prohibiting gaming on after-acquired lands remains in force. *See Kentucky Div., Horsemen's Benevolent Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406, 1416 (6th Cir. 1994) (stating that federal legislation conditioning the legality of off-track betting on the consent of the host racing association does not allow the association to "make the law . . . rather, the veto is merely a condition established by Congress upon the application of Congress' general prohibition of interstate off-track betting").

During oral argument, it became evident that the Tribes' concern is not so much the unconstrained discretion that Congress permitted the Governors of the 50 States to exercise under § 2719(b)(1)(A), but that Congress had delegated any power to the Governors at all. The Tribes conceded that they would not have objected on nondelegation grounds had Congress conditioned the Secretary's power to take land into trust not upon the concurrence of a governor, but rather upon the majority vote of the Indian tribes with reservations encompassed by the state where the proposed trust land is located. In the Tribes' view, the Governor of Wisconsin is an improper delegatee because his administration oversees the Wisconsin State Lottery, which they maintain is in competition with the casinos subject to regulation under IGRA. The Tribes rely on *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) for the proposition that Congress may not delegate to a private party the power to regulate an industry when the delegatee has "interests [that] may be and often are adverse to the interests of others in the same business."

At issue in *Carter* were certain provisions of the Bituminous Coal Conservation Act of 1935. Under that Act, the largest producers of coal were delegated the power to establish the maximum hour and minimum wage terms that controlled the entire coal industry. *Carter*, 298 U.S. at 284. In striking down the provision, the Supreme Court was troubled that the statute did not empower "an official or an official body, presumptively disinterested," but instead empowered "private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* at 311. The Supreme Court concluded that the Act denied the smaller coal producers their "rights safeguarded by the due process clause of the Fifth Amendment," and therefore invalidated the provision at issue. *Id.* at 311-12.

We conclude that the gubernatorial concurrence provision does not raise the concerns presented in *Carter*. The Governors of the 50 States are politically accountable to their constituencies and will therefore be motivated to maximize the public good, contrary to the chief coal producers in *Carter*, whose relationship with minor coal producers was "conflicting and even antagonistic," and whose motivations were self-serving. *See Carter*, 298 U.S. at 311. Even if a particular governor might enjoy ultimate authority over a state lottery or gaming system, that role will surely be eclipsed by the governor's responsibility to regulate the broader state economy.

In conclusion, we find that § 2719(b)(1)(A) does not violate the nondelegation doctrine because it does not entrust to the Governors of the 50 States any legislative power, nor does it violate the principles of *Carter* by wrongfully authorizing a self-interested leader of private industry to regulate its competitors.

C.

We now address the Tribes' argument that the gubernatorial concurrence provision violates the Appointments Clause. That Clause states that:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art II. § 2, cl. 2. Any person "exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be ap-

pointed in a manner prescribed by § 2, cl. 2 of that Article." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

The Tribes contend that a governor is required by § 2719(b)(1)(A) to execute "final decisional discretion on whether and how federal power is exercised," and that this function is sufficiently significant under *Buckley* as to merit the title of "Officer of the United States." Thus, they claim, the gubernatorial concurrence provision violates the Appointments Clause because no governor has been nominated by the President with the advice and consent of the Senate, as is required by Article II, § 2, cl. 2 of all Officers of the United States.

At issue in *Buckley* were certain provisions of the Federal Election Campaign Act which vested the members of the Federal Election Commission ("commissioners") with broad authority, including "recordkeeping, disclosure and investigative functions"; "extensive rulemaking and adjudicative powers"; and the power to "institute a civil action" for the purposes of enforcing the Act. *Buckley*, 424 U.S. at 110. The Supreme Court held that, because the commissioners enjoyed "primary responsibility for conducting civil litigation . . . for vindicating public rights," their "authority . . . cannot possibly be regarded as merely in aid of the legislative function of Congress," but rather extended to typically executive functions of administering and enforcing the law. *Id.* at 139-40. Therefore, because the Act specified a procedure for appointing the commissioners different from that required by Article II, § 2, cl. 2, the Supreme Court held that the provisions of the Act that conferred authority to the commissioners to execute federal law were in violation of the Constitution. *Id.* at 140.

Unlike the members of the Federal Election Commission in *Buckley*, the Governors of the 50 States do not enjoy power under § 2719(b)(1)(A) to enforce or administer federal law. The power to execute § 2719(b)(1)(A) is entrusted exclusively to the Secretary of the Interior, as only he or she may

lift IGRA's general prohibition of gaming on after-acquired land. A governor's role under § 2719(b)(1)(A) is limited to satisfying one precondition to the Secretary of the Interior's authority under § 2719(b)(1)(A) to permit gaming on after-acquired trust land.

Nor is the governor's role under § 2719(b)(1)(A) significant enough to merit the title of an Officer of the United States. An Officer of the United States enjoys more than a merely "temporary, episodic" opportunity to act pursuant to federal law, and instead enjoys a somewhat regular opportunity to issue enforceable decisions. *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 877, 881 (1991) (differentiating between special masters whose duties are "temporary" and "episodic" in nature and subject to review, and special trial judges who enjoy regular opportunities to issue final decisions of federal law, holding that only the latter served as Officers of the United States subject to the Appointments Clause). Not only is a governor unable to issue the Secretary of the Interior's final decision regarding an Indian tribe's application under § 2719(b)(1)(A), a governor's opportunity to participate in the administration of IGRA will arise irregularly, if it materializes at all. Moreover, the influence of any one governor is temporary and limited to the particular application under review.

The Tribes argue vociferously that the Governor of Wisconsin is not permitted by any Wisconsin state law to communicate with the federal government regarding proposals to acquire Wisconsin land in trust for the benefit of Indians. Rather, only federal law authorizes the Governor of Wisconsin to respond to the Secretary of the Interior's request for concurrence; in their view, this necessarily imbues the Governor with the role of an Officer of the United States. Notwithstanding the absence of a specific Wisconsin state law authorizing the Governor of Wisconsin to respond to the Secretary of the Interior's request for concurrence, we con-

clude that the Governor of Wisconsin's role under § 2719(b)(1)(A) is not one that requires appointment in conformity with Article II, § 2, cl. 2.

The text of the relevant portion of the Appointments Clause limits its applicability to Appointments ". . . not herein otherwise provided for, and which shall be established by Law . . ." U.S. Const. Art. II, § 2, cl. 2. In determining whether a particular position is "established by Law," the Supreme Court has considered whether the position's "duties, salary, and means of appointment" are stipulated by federal law. *See Freytag*, 501 U.S. at 881-82. Here, even though federal law requests that the office of the Governor of Wisconsin respond to the Secretary of the Interior's request for concurrence, it is the citizens of Wisconsin, and not Congress, who elect the Governor, pursuant to procedures mandated by the Constitution of the State of Wisconsin. We conclude that the requirements of the Appointments Clause are not triggered by the gubernatorial concurrence provision because that provision neither specifies the "duties, salary, and means of appointment" of any governor, nor does it empower any governor to execute federal law.

Further, we note that the separation of powers concerns underlying the Appointments Clause are not suggested by the gubernatorial concurrence provision. *See Freytag*, 501 U.S. at 878 ("The roots of the separation-of-powers concept embedded in the Appointments Clause are structural and political."). In § 2719(b)(1)(A), Congress did not select the administrator of federal gaming policy in derogation of the President's power to appoint subordinates to aid in the execution of federal law. Rather, Congress directed the Secretary of the Interior, a Presidential appointee, to consult with the chosen representative of the citizens of the States before executing the law. Therefore, we agree with the Ninth Circuit that the governor's concurrence provision does not violate the Appointments Clause. *Confederated Tribes*, 110 F.3d at 698.

D.

The Tribes seek to persuade this Court that the gubernatorial concurrence provision compels state governors to administer federal law in violation of principles of federalism as interpreted in *New York v. United States*, 505 U.S. 144 (1992) and in *Printz v. United States*, 521 U.S. 898 (1997). In *New York v. United States*, at issue were provisions of the Low-Level Radioactive Waste Policy Amendments Act which required each state to either enact legislation providing for the disposal of locally generated radioactive waste or to take title to and possession of that waste. *New York v. United States*, 505 U.S. at 153-54. The Supreme Court invalidated the provisions at issue, holding that the Tenth Amendment prohibited the federal government from compelling "the States to enact or administer a federal regulatory program." *Id.* at 188. In *Printz*, the Supreme Court applied the rule of *New York* to the Brady Act, a federal statute which required state law enforcement officers to conduct background checks of prospective handgun purchasers. The *Printz* Court held that Congress may no more "command the State's officers . . . to administer or enforce a federal regulatory program," than it may command State legislatures to do so. *Printz*, 521 U.S. at 935.

The Tribes contend that the Secretary of the Interior's request for a governor's concurrence pursuant to § 2719 (b)(1)(A) is no less offensive to state sovereignty than were the statutes at issue in *New York v. United States* and *Printz*. In their view, § 2719(b)(1)(A) mandates that state governors participate in the federal regulation of property held in federal trust for the benefit of Indians. We disagree. Neither the States nor their Governors are required to aid the federal administration of § 2719(b)(1)(A) in any way. Upon receiving the Secretary of the Interior's request for concurrence, a governor may, consistent with IGRA, willfully ignore it. In that instance, the governor's inaction could not fairly be

characterized as the "administ[ration] or enforce[ment] [of] a federal regulatory program" under *Printz*. *See Printz*, 521 U.S. at 935. In neither *New York v. United States* nor *Printz* were state officials permitted to disregard a federal directive; to the contrary, compliance with the Low-Level Radioactive Waste Policy Amendments Act and the Brady Handgun Violence Protection Act required officers of the States to implement the costly and time-consuming programs that Congress had devised.

The Tribes counter that it is immaterial to the federalism analysis that a governor's role under § 2719(b)(1)(A) is purely voluntary, because even in choosing inaction, a governor will have a "dispositive" impact on IGRA's regulatory scheme. Indeed, if the Secretary of the Interior receives no response from a governor whose concurrence he or she had solicited, the Secretary must deny the application pending under § 2719(b)(1)(A). A governor is thus inescapably ensnared in the execution of federal law, the Tribes argue, and despite a governor's decision to ignore the Secretary of the Interior's inquiry, the result is in violation of principles of federalism under *New York v. United States* and *Printz*.

Despite the impact of gubernatorial inaction under § 2719(b)(1)(A), we conclude that the governor's role under that Section does not violate principles of federalism. *Printz* and *New York v. United States* are concerned with the denigration of state sovereignty that results when Congress forces the States to implement federal policy against their will. Section 2719(b)(1)(A), however, preserves state sovereignty by merely encouraging the States to decide whether to endorse federal policy and by reserving the ultimate execution of that policy to the federal government. That Section neither imposes on the States nor depends on them for the implementation of federal law. Contrary to the view of the Tribes, *Printz* and *New York v. United States* do not prohibit the federal government from seeking the voluntary

input of the States in the federal government's execution of federal law.

Nor does the gubernatorial concurrence provision obstruct the political accountability of the dual sovereigns. Because the provision does not require a governor to respond, each governor is solely responsible for the decision to grant, decline, or deny consideration of the request for concurrence. The inability to shift blame to Congress for the decision ensures that a governor will remain attuned to political pressure from his or her constituents. *See New York v. United States*, 505 U.S. at 168 ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."). It is only when Congress mandates that state officials devote attention to a particular matter that the local electorate is rendered politically mute. In that instance, as in *New York v. United States*, no amount of lobbying will resonate with local lawmakers because the state's agenda is no longer within their control.

In addition, the procedure under § 2719(b)(1)(A) is transparent, enabling citizens and tribal members of an affected State to ascertain which sovereign to criticize or laud after a decision has been rendered. For example, if the Secretary of the Interior refrains from soliciting the concurrence of the relevant governor, an applicant tribe will conclude that the Secretary of the Interior found § 2719(b)(1)(A)'s factual predicates wanting. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941 (7th Cir. 2000). Yet, if the Secretary of the Interior issues a favorable finding, but ultimately denies the application, the constituents will gather that the governor likely declined to issue a concurrence, as is demonstrated by the present litigation. Finally, if the Secretary of the Interior takes land into trust pursuant to § 2719(b)(1)(A), tribal members and the citizens of the state where the trust land is located can hold both sovereigns accountable.

Lastly, the Tribes argue that the gubernatorial concurrence provision violates principles of federalism because it impermissibly interferes with the functioning of state government by rearranging its structure. The Tribes submit that the gubernatorial concurrence provision requires the Governor of Wisconsin to enact Wisconsin's public policy regarding gaming on after-acquired trust land, a function which they characterize as legislative. This role violates the Wisconsin Constitution, they argue, because Article IV, § 1 of the Wisconsin Constitution reserves the legislative power to Wisconsin's "senate and assembly." The Tribes believe that when the Secretary of the Interior seeks the concurrence of the Governor of Wisconsin, he or she requires the Governor to legislate Wisconsin's gaming policy in violation of the Wisconsin Constitution.

The Tribes erroneously assume that § 2719(b)(1)(A) vests the Governor of Wisconsin with authority to act outside of the strictures of the gaming policy that Wisconsin has already established through legislation and amendments to the Wisconsin Constitution. In fact, the Wisconsin Constitution and various Wisconsin statutes have already implemented a fairly complex gaming policy. The Wisconsin Constitution, which originally prohibited the establishment of a lottery, was amended in 1987 to authorize a lottery operated by the State. *See* Wis. Const. Art. VI § 24(6)(A). The lottery is limited in the types of games it may offer. *See* Wis. Stat. § 565.01 (6)(m); Wis. Const. Art. IV § 24(6)(c). Other than the state-operated lottery, the Wisconsin Constitution permits gaming only in the following circumstances: bingo and raffle games operated by "religious, charitable, service, fraternal or veterans' organizations," and pari-mutuel wagering and on-track betting. Wis. Const. Art. IV §§ 24(3-5). Notably, casino gambling is not permitted under Wisconsin law.

The establishment of a state lottery signals Wisconsin's broader public policy of tolerating gaming on Indian lands.

See California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). In *Cabazon*, the Supreme Court held that a state has no authority to enforce its gaming laws on Indian lands if it permits any gaming activity under state law. *Id.* at 211. Further, because IGRA permits gaming on Indian lands only if they are "located in a State that permits such gaming for any purpose by any person, organization or entity," 25 U.S.C. § 2710(d)(1)(b), the lottery's continued existence demonstrates Wisconsin's amenability to Indian gaming. Although Wisconsin has not been willing to sacrifice its lucrative lottery and to criminalize all gambling in order to obtain authority under *Cabazon* and § 2710(d)(1)(b) to prohibit gambling on Indian lands, Wisconsin once sought (albeit unsuccessfully) to limit Indian gaming to the "identical types of games" authorized for the Wisconsin State Lottery. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. 480, 487 (W.D. Wis. 1991) *appeal dismissed for want of jurisdiction*, 957 F.2d 515 (7th Cir. 1992).

The Tribes and the Governor of Wisconsin may not share an opinion of the overriding goal of Wisconsin's gaming policy, but they must concede that a gaming policy exists. When the Governor of Wisconsin considers the Secretary of the Interior's request for concurrence regarding an off-reservation gaming proposal, he or she will be informed by the public policy represented by the Wisconsin Constitution and relevant statutes. Thus, the Governor's decision regarding any particular proposal is not analogous to creating Wisconsin's gaming policy wholesale–a legislative function–but rather is typical of the executive's responsibility to render decisions based on existing policy. The governor's role is not inconsistent with the Wisconsin Constitution, which vests "the executive power . . . in a governor." Wisc. Const. Art 5, § 1. Further, it is not problematic that the Governor of Wisconsin enjoys discretion within the limitations of Wisconsin's existing gaming policy to render an opinion regarding any

particular application under § 2719(b)(1)(A). *See Printz*, 521 U.S. at 927 ("Executive action that has utterly no policy-making component is rare, particularly at an executive level as high as a jurisdiction's chief law enforcement officer.").

Additionally, the Governor of Wisconsin's power to respond to the Secretary of the Interior's request for concurrence is not without a check in the Wisconsin Legislature. Indeed, on two occasions, the Wisconsin Legislature has attempted to curtail the Governor's power to concur. *See* 1999 Wis. Act 9, § 7(q), and 2003 Assembly Bill 144. Although the Legislature did not override the Governor's veto of either bill, the Wisconsin Constitution provides a mechanism for the Legislature to do so. *See* Wis. Const. Art. 5 § 10(2)(a). Moreover, the citizens of Wisconsin could render the gubernatorial concurrence provision a nullity by repealing the Constitutional amendments that sanction gaming in Wisconsin; if Wisconsin prohibited all gaming, § 2710 (d)(1) would not permit gaming on Indian lands in Wisconsin, and the Secretary of the Interior would have no occasion to solicit the Governor's concurrence.

In conclusion, we hold that § 2719(b)(1)(A) does not violate principles of federalism by either commandeering the Governors of the 50 States into federal service or by interfering with the functioning of the Wisconsin state government.

E.

We now address the Tribes' argument that the gubernatorial concurrence provision is in violation of the federal government's trust responsibility to Indians. The Tribes submit that the Indian Commerce Clause, U.S. Const. art. I § 8, cl. 3, confers "plenary power to legislate in the field of Indian affairs" to Congress, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), but that this power is limited by the federal government's trust obligation to

Indians. They argue that all legislation enacted pursuant to the Indian Commerce Clause must be "rationally tied to furthering the federal government's trust obligations." Further, they believe that the gubernatorial concurrence provision does not meet that standard because it delegates to non-trustees the authority to make decisions that effect the administration of Indian affairs. We conclude that Congress's obligation to Indians is not so broad as to require invalidation of the provision at issue.

First, the Tribes argue that the trust doctrine cannot be severed from the Indian Commerce Clause. We disagree. The Supreme Court has acknowledged the "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people," *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942), and the "undisputed existence of a general trust relationship between the United States and the Indian people," *United States v. Mitchell*, 463 U.S. 206, 225 (1983), yet it has not held that this obligation arises from any particular provision of the Constitution. Rather, the trust relationship arises from the United States' unfortunate history of Indian policy, as is explained in the following paternalistic terms: "[i]n the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection . . . ." *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)). It is the common law, and not the Constitution, that recognized the Indian tribes as "the wards of the nation." *See United States. v. Kagama*, 118 U.S. 375, 384 (1886).

Despite the trust doctrine's lack of foundation in the Constitution, the Tribes seek to persuade this Court that all Indian legislation must be related rationally to furthering the federal government's trust obligation to Indians. In support, the Tribes cite *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977) for the proposition that "legislative judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . .'" *Weeks*, 430 U.S. at 85 (quoting *Morton*, 417 U.S. at 555).

In *Morton*, non-Indian employees of the Bureau of Indian Affairs ("BIA") challenged the Indian Reorganization Act on the ground that the preference granted to qualified Indians for employment at the BIA constituted invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *Id.* at 537. The purpose of the employment preference was to "give Indians a greater participation in their own self-government; to further the Government's trust obligation toward Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." *Id.* at 542-43 (internal footnotes omitted). Similarly, in *Weeks*, an Act of Congress was challenged on the grounds that it denied non-beneficiaries of Indian legislation the equal protection of the laws in violation of the Due Process Clause of the Fifth Amendment. *Weeks*, 430 U.S. 75. At issue in *Weeks* was an authorization by Congress to disburse funds to certain Delaware Indians in order to redress the United States' breach of a particular treaty. *Id.* It was challenged by a group of Delaware Indians who were excluded from the distribution. *Id.*

In both cases, the Supreme Court established that congressional legislation was subject to judicial review "to determine whether it violates the equal protection component of the Fifth Amendment." *Id.* at 919 (citing *Morton*, 417 U.S. 535). The *Morton* Court cautioned, however, that courts must

consider the constitutional validity of Indian legislation in the "historical and legal context" of the United States' trust obligation to Indians. *Morton*, 417 U.S. at 553. The Supreme Court noted that "[l]iterally every piece of legislation dealing with Indian tribes . . . single[s] out for special treatment a constituency of tribal Indians," and that if such legislation were to be "deemed invidious racial discrimination, . . . [that] the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552. Thus, in order to preserve Congress's ability to legislate in furtherance of the United States' trust obligation to Indians, the Supreme Court held that "special treatment [that] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . will not be disturbed." The Supreme Court applied the *Morton* standard to the Fifth Amendment challenge in *Weeks*, and again upheld the Act of Congress at issue on the basis that it was rationally tied to fulfillment of the trust obligation to Indians. *Weeks*, 430 U.S. at 85, 90.

To read *Morton* as requiring that all legislation enacted pursuant to the Indian Commerce Clause be rationally related to the United States' trust obligation to Indians would be to take the *Morton* rule outside of the limited context in which it arose. Neither *Morton* nor *Weeks* holds that all legislation enacted pursuant to the Indian Commerce Clause be rationally related to the trust obligation. Rather, they hold that courts may not invalidate Indian legislation on the ground that the legislation offends the Due Process Clause of the Fifth Amendment if that legislation was enacted in furtherance of the trust obligation. *See Weeks*, 430 U.S. at 85, 90. In arguing that *all* Indian legislation must comply with the trust doctrine, the Tribes seek to impose a limitation on Congress's plenary power which has no basis in the Constitution and has not yet been recognized by the Supreme Court.

The Supreme Court has not yet invalidated a federal statute on the ground that it did not advance the federal govern-

ment's trust obligation to Indian tribes. Indeed, even after concluding that an Act of Congress failed to comport with Congress's fiduciary responsibility to Indians, the Supreme Court refrained from acknowledging a cause of action on that ground. *See United States v. Sioux*, 448 U.S. 371 (1980). In *Sioux*, the Sioux Nation challenged the Congressional Act of February 28, 1877 ("the 1877 Act") which had authorized the confiscation of lands that had been pledged by treaty to the Sioux Nation. *Id.* at 374. Before evaluating the Sioux Nation's claim, the Supreme Court sought to answer a preliminary question: had Congress enacted the 1877 Act in its capacity as trustee and guardian of tribal property, or had Congress instead passed the 1877 Act in exercise of its power of eminent domain? *Id.* at 408, 416. The *Sioux* Court endorsed the following test for distinguishing between the two types of Congressional action. If Congress had "made a good faith effort to give the Indians the full value of their lands," then Congress had acted in its fiduciary capacity. *Id.* at 416. In the event that it had not attempted to adequately compensate the Sioux, however, then Congress had exercised its power of eminent domain and effecting a taking for which just compensation was due under the Fifth Amendment. *Id.* at 408, 416. Notably, the Supreme Court did not hold that Congress violated the trust doctrine by failing to make a "good faith effort" to "transmut[e]" the Sioux Nation's property for property of equal value, even though it acknowledged that a trustee would ordinarily be required to do so when dispensing of the property of her ward. *See id.* at 416. The Sioux Nation prevailed in *Sioux*, but singularly on the ground that 1877 Act effected a taking under the Fifth Amendment. *Id.* at 423-24. Thus, *Sioux* establishes that, in the context of congressional management of Indian land, the trust doctrine imposes no restriction on Congress beyond compliance with the constitutional restrictions which would otherwise constrain Congress's power.

Although *Weeks* states that a court should not refrain "from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment," *Weeks*, 430 U.S. at 919, the Supreme Court has not yet held that an Act of Congress is subject to invalidation on the ground that it violates the federal government's general trust obligation to Indians. Thus, this Court will not invalidate the gubernatorial concurrence provision on that basis.

F.

Finally, we address the Tribes' claim that the district court erred in denying their conditional motion to file a second amended complaint. In the event that the court upheld the gubernatorial concurrence provision, the motion requested that the Tribes be permitted to amend their complaint to add a claim that then-Governor McCallum had relied on improper factors when he refused to concur in the Secretary of the Interior's favorable determination. The Tribes submitted the conditional motion and supporting brief with their reply to the State and federal defendants' cross-motion for judgment on the pleadings.

A "district court's denial of a motion to amend pleadings under Fed.R.Civ.P. 15(a) will be overturned on appeal only if it is shown that the district court abused [its] discretion by refusing to grant the leave without any justifying reason." *J.D. Marshall Intern., Inc. v. Redstart, Inc.*, 935 F.2d 815, 819 (7th Cir. 1991). In this case, the district court denied the motion for leave to amend on the grounds that the Tribes had unduly delayed in bringing the claim and that allowing such an amendment would be a futility.

The Tribes concede that the facts that demonstrate the invalidity of Governor McCallum's withholding of concurrence were known to them when they filed their first amended complaint. In fact, they included those allegations in the first amended complaint, yet they did not assert the invalidity of

the Governor's concurrence as a theory of relief at that time. Nor did the Tribes assert the claim in their memorandum in support of judgment on the pleadings. The first time that the Tribes advanced the theory that they now wish to present was in their combined reply brief in support of their motion for judgment on the pleadings and brief in response to the defendants' cross-motions for judgment on the pleadings. The Tribes have not explained their failure to move to amend the complaint prior to that time.

The Tribes have not provided an adequate justification for the delay in stating the claim that they now wish to bring, *see Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 625 (7th Cir. 1987), nor have they explained why they failed to argue that claim in their brief in support of their motion for judgment on the pleadings. We therefore conclude that the district court did not abuse its discretion in denying the motion for leave to amend.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgment of the district court in favor of the federal and State defendants in all respects.

A true Copy:

Teste:

/s/ _____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS AND SAKAOGON CHIPPEWA COMMUNITY (MOLE LAKE BAND OF LAKE SUPERIOR CHIPPEWA INDIANS),

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, THE HONORABLE GALE NORTON, Secretary of the Department of the Interior, and JAMES H. MCDIVITT, Deputy Assistant Secretary/Indian Affairs,

Defendants,

and

JAMES E. DOYLE,[1] Governor of the State of Wisconsin and STATE OF WISCONSIN,

Defendants-Intervenors.

OPINION AND ORDER

02-C-553-C

[Stamped "A copy of this document has been mailed to the following: All Counsel of Record this 23rd day of April, 2003 by S. Vogel, Secretary to *Judge* CRABB"]

This is a civil action for declaratory relief in which three Wisconsin Indian tribes, Lac Courte Oreilles Band of Lake

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Governor James E. Doyle has been substituted for his predecessor in office, Governor Scott McCallum.

Superior Chippewa, Red Cliff Band of Lake Superior Chippewa and Sakaogon Chippewa Community or Mole Lake Band of Lake Superior Chippewa, are challenging the constitutionality of the gubernatorial concurrence requirement in the Indian Gaming Regulatory Act, 25 U.S.C. § 2719 (b)(1)(A). Plaintiffs contend that Congress's inclusion of such a provision is an unconstitutional delegation of power, or, alternatively, that it violates the appointments clause, Art. II, § 2; the Tenth Amendment; and the Fifth Amendment equal protection clause. Plaintiffs raise a common law claim as well, contending that the gubernatorial concurrence requirement is a congressional breach of trust.

The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, represents Congress's attempt to balance the competing interests of Indians, states and the federal government in the conduct of gaming activities on Indian lands. The resulting legislation is intended to promote tribal economic development, self-sufficiency and strong tribal government, § 2702(1), and to provide clear standards for the regulation of gaming, § 2702(2). The basic framework of the law is the division of Indian gaming into three classes. Class I games are social or traditional games played in connection with tribal ceremonies or celebrations over which the tribes have exclusive regulatory authority. Class II games include bingo-related and card games. Tribes may conduct these games and offer them to the public, if the state in which the tribal lands are located permits such gaming for any purpose. Class III games include all gaming not included in the other two classes, such as casino-type games, parimutuel betting and lotteries. Tribes may offer these games only if (1) such gaming is authorized by a tribal ordinance approved by the chair of a commission that is established by the Act; (2) it is located in a state that permits such gaming; and (3) it is conducted in conformity with a tribal-state compact, negotiated by the tribe with the governor of the state. 25 U.S.C. § 2703.

Congress did not limit all gaming to existing Indian lands. It provided a mechanism for tribes to offer gaming on land that they did not own as of 1988, when the Gaming Regulatory Act became effective. 25 U.S.C. § 2719. The statute prohibits all gaming on such land, with certain exceptions. Under the one relevant to this case, the Secretary of the Interior may reach a determination that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community. Before making such a determination, the Secretary must consult with the Indian tribe and appropriate state and local officials, including officials of other nearby Indian tribes. In addition, "the Governor of the State in which the gaming is to be conducted [must concur] in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A).

It is this concurrence requirement that plaintiffs are challenging as unconstitutional and a breach of trust. The case is before the court on (1) plaintiffs', defendants' and defendant-intervenors' cross-motions for judgment on the pleadings; and (2) plaintiffs' "conditional" motion to amend their complaint. The states of Alabama, California, Colorado, Connecticut, Florida, Illinois, Iowa, Kansas, Louisiana, Minnesota, Michigan, Nebraska, Nevada, New Jersey, New Mexico, Oregon, South Dakota, Texas, Vermont, Washington and Wyoming have filed a joint amicus curiae brief in opposition to plaintiffs' motion for judgment on the pleadings.

I conclude that the gubernatorial concurrence of the Indian Gaming Regulatory Act does not violate the non-delegation doctrine because the legislation expresses the will of Congress and provides an intelligible principle by which it can be determined that it is Congress's will that is being carried out; it does not violate the appointments clause because it does not diffuse executive power; and it does not

conscript governors into federal service in violation of the Tenth Amendment. Therefore, the provision does not violate the Constitution. (Plaintiffs have not pursued their contention that the legislation violates the equal protection clause of the Fifth Amendment.) It is not a congressional breach of trust because it was enacted by Congress pursuant to the federal government's plenary powers over Indians. Furthermore, plaintiffs cannot challenge the alleged breach of trust because such a suit would be barred by the government's sovereign immunity.

I will grant defendants' and defendant-intervenors' motions for judgment on the pleadings and deny plaintiffs' motion for judgment on the pleadings. I will deny plaintiffs' conditional motion to amend the complaint. The motion is untimely and probably futile.

The parties agree that there are no disputed facts and that the motions can be decided as a matter of law.

BACKGROUND

In October 1993, plaintiffs submitted an application to the Secretary of the Interior, asking that the federal government take certain land into trust for them, as the Secretary is authorized to do under the Indian Reorganization Act of 1934, 25 U.S.C. § 465. Plaintiffs sought to establish an off-reservation gaming casino at an existing greyhound racing facility in Hudson, Wisconsin.

On July 14, 1995, the Secretary rejected plaintiffs' application. Plaintiffs objected to the Secretary's rejection and filed suit in this court, *see Sokaogon Chippewa Community v. Babbitt*, 961 F.Supp. 1276 (W.D. Wis. 1997) (bands made sufficiently strong showing of improper influence on agency decision to be entitled to extra-record discovery and examination of agency personnel). While portions of the lawsuit were still pending and after congressional investigations and hearings, the parties settled their dispute on

October 8, 1999. As part of the settlement agreement, the Secretary vacated the July 14 rejection and agreed to resume consideration of plaintiffs' application.

On February 20, 2001, the Secretary determined that plaintiffs' proposal to conduct gaming on lands to be acquired in trust was in the best interest of the Indian tribes and would not be detrimental to the surrounding community. *See* 25 U.S.C. § 2719(b)(1)(A). On May 11, 2001, one day after plaintiffs filed this lawsuit, then-Governor Scott McCallum formally advised the Secretary of his non-concurrence with her determination. *See id.* On June 13, 2001, the Secretary denied plaintiffs' application and invited plaintiffs to re-apply to acquire the subject land in trust for non-gaming purposes.

OPINION

A. *Breach of Trust Claim*

The bulk of plaintiffs' challenge to 25 U.S.C. § 2719 rests on constitutional grounds. Therefore, I will begin with their one non-constitutional claim, which is grounded on a common law breach of trust. *See Clinton v. Jones,* 520 U.S. 681, 690 n.11 (1997) ("'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [courts] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'") (quoting *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944)). Defendants contend that no examination of this claim is necessary or even permissible because the federal government's sovereign immunity bars plaintiffs from suing on this common law claim. In order to decide whether defendants are correct, it is necessary to determine the nature of plaintiffs' breach of trust claim. Therefore, I will start with a discussion of the claim and then take up the sovereign immunity defense.

Plaintiffs' breach of trust claim rests on the premises that (1) the federal government has underlying trust obligations to

the Indians; (2) Congress cannot undermine those obligations to the Indians by claiming to be exercising its general powers when it is actually acting pursuant to its trust obligations; (3) even when Congress is exercising plenary powers over Indians, the courts have the authority to review any legislation to insure that it does not breach the government's trust obligations; and (4) in reviewing such legislation, courts can uphold it only if it is tied rationally to the fulfillment of Congress's unique obligations toward Indians. As it relates to this case, plaintiffs assert that Congress was acting in its role as a trustee when it enacted the gaming regulation at issue and that it violated its trust obligations to the Indians when it made the approval of gaming on after-acquired lands subject to the concurrence of a state governor.

It is true that the relationship between the United States and Indian tribes has been said to resemble that of guardian and ward, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *United States v. Mitchell (Mitchell II)*, 463 U.S. 206, 225 (1983) (referring to "undisputed existence of a general trust relationship between the United States and the Indian people"). Many statutes establish specific fiduciary duties for the federal government in relation to Indian tribes. *See, e.g., United States v. White Mountain Apache Tribe*, 123 S.Ct. 1126 (2003) (statute providing that former military post to be "held by the United States" in trust for tribe); *Mitchell II*, 463 U.S. 206, (25 U.S.C. § 406(a) gives Secretary of Interior broad statutory authority to manage and sell reservation timber upon consideration of "the needs and best interests of the Indian owner and his heirs"; statute created fiduciary duty requiring compensation for damages sustained from Secretary's breach of duties); *cf. United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 542 (1980) (Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-338, created only limited trust relationship between federal government and Indian allottee that did not "impose any duty upon the Government to manage timber resources"). However, plain-

tiffs are not arguing either that the Indian Gaming Regulatory Act imposes fiduciary duties on the federal government or that individual defendants Norton and McDevitt failed to carry out a fiduciary duty imposed on them by the Act. Their argument is a different one: the government's general fiduciary duty to the tribes requires it to legislate in the interests of the tribes and of their sovereignty in every instance. The corollary of their argument is that the courts have the authority to review all Indian legislation to insure that it meets this standard.

As plaintiffs admit, Plts.' Reply Br., dkt. #22, at 33 n.15, no court has ever invalidated a statute on the basis of the trust doctrine. However strong the arguments for holding the government to its stated fiduciary responsibilities or to giving the same kind of deference to the sovereignty of tribes as to that of states, *see, e.g.*, Brad Jolly, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 Ariz. St. L.J. 273 (1997); materials cited in *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F.Supp. 9, 11-12 (D.D.C. 1990), the Supreme Court has held that the federal government has almost unlimited authority over Indian tribes. It may abrogate treaties and divest the tribes of their sovereignty. *See, e.g., United States v. Sioux Nation of Indians*, 448 U.S. 371, 410-11 and n.11 (1980) (Congress has power to abrogate treaties with Indians); *United States v. Wheeler,* 435 U.S. 313, 323 (1978) (tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance").

In *Sioux Nation*, 448 U.S. 371, the Supreme Court discussed two lines of cases involving the government's power over Indian property: those in which the United States is acting as trustee for the tribes, exercising its plenary powers over them and their property, "as it thinks is in their best interests," *id.* at 408, and those in which it is exercising its power of eminent domain, taking Indian property within

the meaning of the Fifth Amendment. *Id.* (citing *Three Affiliated Tribes of Fort Berthold Reservation v. United States,* 390 F.2d 686, 691 (Ct. Cl. 1968)). In the former case, the question for the courts is whether the government has acted as a proper trustee: Did it exchange assets for other assets of equal value? In the latter case, the question is whether the government effected a taking and, if so, what the Fifth Amendment requires in the way of compensation for the taking. Neither situation is at issue in this case. Plaintiffs' challenge to the Indian Gaming Regulatory Act does not focus on the government's handling of tribal property but on the government's power to enact general legislation that intrudes on the tribes' sovereignty.

Plaintiffs acknowledge that Congress has the authority to enact general legislation that applies to Indians, Plts.' Br., dkt. #4, at 30 ("trust relationship does not insulate tribes from the reach of Congress' general legislative powers"), but they assert that when Congress enacted the gaming act, it did so pursuant to its trust obligations, not its general legislative powers. Plaintiffs do not back up this assertion with any statutory language or legislative history and they do not explain away the case law to the contrary. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47-48 (1996) ("Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis of the operation and regulation of gaming by Indian tribes" and did so pursuant to its powers under Indian commerce clause, U.S. Const., art. I, § 8, cl. 3); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("central function of the Indian Commerce Clause is to provide Congress with the plenary power to legislate in the field of Indian affairs"). When Congress legislates under this clause, the courts' reviewing authority is limited to determining the constitutionality of the legislation, as in *Seminole Tribe* (holding unconstitutional provision allowing suits against states or state officials for failure to negotiate compacts under gaming act as violative of Eleventh

Amendment). It does not extend to reviewing the extent to which the legislation carries out the government's general trust duties to the tribes.

In addition to arguing that the government has a continuing trust duty to Indian tribes when it regulates any Indian activity, plaintiffs rely on the Indian Reorganization Act of 1934, 25 U.S.C. § 465, which provides that lands acquired are "taken in the name of the United States in trust for the Indian tribe." The reason for plaintiffs' reliance is unclear. The statute does not apply to plaintiffs because the United States has not acquired the land at issue in trust. Even if it did apply, it imposes no specified fiduciary duties upon the United States. In that respect, it is like the General Allotment Act, which the Supreme Court has found creates only a limited trust without fiduciary duties. *Mitchell I*, 445 U.S. 535. *See also Thomas v. United States*, 141 F.Supp. 2d 1185, 1205 (W.D. Wis. 2001) (court not persuaded "that § 476 of the Indian Reorganization Act imposes fiduciary obligations on the United States as a trustee").

Plaintiffs argue that the Indian Gaming Regulatory Act provides for extensive federal oversight and control of gaming on Indian land. Therefore, they assert, the Act is equivalent to the regulations in *Mitchell II* and gives rise to a fiduciary duty. Again, plaintiffs' argument fails because the United States never acquired the subject land in trust for plaintiffs. Without a trust, there is no fiduciary duty. Even setting this logical infirmity aside, the Act itself does not create a fiduciary duty; it is a regulatory scheme that balances the competing interests of the states, the federal government and Indian tribes.

Congress enacted the gaming act in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), holding that Public Law 280 states such as California had no authority to apply their gambling laws to Indian gaming. Under Pub. L. 280,

Congress gave six states, including California and Wisconsin, jurisdiction over specified areas of Indian country within the states. *Id.* at 207. The states have broad criminal jurisdiction over offenses committed by or against Indians within all Indian county and jurisdiction over private civil litigation involving reservation Indians in state court, but no general civil regulatory authority. *Id.* at 207-08. California allowed many forms of gaming activities on non-reservation lands; therefore, the state "regulated" rather than "prohibited" such activities. Because states lack the authority to enforce civil regulatory laws on Indian lands and because Congress had not made state gambling laws applicable to Indian country, California had no jurisdiction over gaming on the Cabazon Band's lands. The Court noted that Congress could give states jurisdiction over Indian gaming, *id.* at 207 ("state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided"), but made it clear that without congressional action, the states would have no way to prevent or regulate Indian gaming. *See* S. Rep. No. 100-446, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071-72; *see also Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 692 (9th Cir. 1997). Heeding this statement, Congress passed the Indian Gaming Regulatory Act, identifying its purposes as being:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702.

Nothing in the Act indicates any intention by Congress to recognize or create a fiduciary duty. The Act does not create a situation in which the federal government holds resources in trust for the Indians. *See Vizenor v. Babbitt*, 927 F.Supp. 1193, 1201 (D. Minn. 1996) ("no fiduciary duty created by [Indian Gaming Regulatory Act's] elaborate regulatory scheme"); *Pueblo of Santa Ana v. Kelly,* 932 F.Supp. 1284, 1297 (D.N.M. 1996) (Indian Gaming Regulatory Act "does not in itself . . . impose duties upon the United States such as those applicable to private trustees").

I conclude that plaintiffs cannot prevail on their claim that the United States breached any common law fiduciary duty to them when Congress passed the Indian Gaming Regulatory Act. Plaintiffs' only other claims are constitutional in nature. Defendants do not deny that the United States has waived its sovereign immunity as to such claims. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690-91 (1949) (when "statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional," sovereign immunity does not prevent suit for declaratory relief against federal officer); *see also Clark v. United States,* 691 U.S. 837, 841 (7th Cir. 1982) (request for declaratory judgment that federal statute is unconstitutional "does not impose an intolerable burden on governmental functions" and is not barred by sovereign immunity).

Although I have concluded that plaintiffs' non-constitutional claim has no merit, I will address defendants' claim that it would be barred in any event by the federal government's sovereign immunity. As a sovereign, the United States cannot be sued without the consent of Congress. "Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity . . . together with a claim falling within the terms of the waiver." *White Mountain Apache Tribe*, 123 S.Ct. at 1131-32; *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (statute must contain unequivocal waiver of immunity to permit suit against federal government).

In the Indian Tucker Act, 28 U.S.C. § 1505, Congress waived its sovereign immunity as to claims for money damages arising out of the federal government's breach of a statutory trust responsibility. Plaintiffs have no claim under this act, because they cannot prove a statutory breach of trust and they are not asking for money damages. The Administrative Procedure Act, 5 U.S.C. §§ 701-706, waives sovereign immunity for claims based on final *agency* actions. It is inapplicable because plaintiffs are challenging a legislative action rather than an agency action. *See* 5 U.S.C. § 701(b)(1) ("agency" does not include "Congress").

Plaintiffs raise one additional argument that is related to their breach of trust argument but independent of it. Citing *Littlewolf v. Lujan*, 877 F.2d 1058 (D.C. Cir. 1989), plaintiffs contend that federal courts have the authority to review legislation that Congress enacts pursuant to its plenary power over Indian affairs to insure that the legislation does not breach Congress's trust obligations. *See id.* at 1063 (Congress's power is "'subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions'") (citing *Sioux Nation*, 448 U.S. at 415) (quoting *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935)). *Littlewolf*

does not help plaintiffs' argument that their common law claim is not barred by sovereign immunity. The case involved a constitutional issue: whether certain legislation deprived Indians of their property interests without due process and effected a taking without just compensation. *Id.* at 1060.

Despite plaintiffs' concession that their breach of trust claim is not a constitutional one, they drift into the constitutional arena when they argue that all Indian legislation must be tied rationally to the fulfillment of Congress's unique obligation to the Indians. The "rational tie" argument comes from *Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 85 (1977), where the Court used it in connection with a constitutional claim that certain Indian legislation violated equal protection and the just compensation clause under the Fifth Amendment. *Id.* at 85-90 (exclusion of Kansas Delaware Indian tribe from distribution of funds authorized by Congress to redress United States' breach of an 1854 treaty held not to violate equal protection under due process clause of Fifth Amendment). With one exception, plaintiffs have not cited any case in which a court reviewed legislation for a rational tie to Congress's trust obligations to the Indians when the legislation was not alleged to be unconstitutional. *Morton v. Mancari,* 417 U.S. 535, 555 (1974), which plaintiffs cite, is another equal protection case in which the Court hold that an employment preference for Indians did not violate the due process clause of the Fifth Amendment. In fact, all of the cases cited by plaintiffs in opposition to defendants' sovereign immunity defense involve either a claim that a federal official has acted improperly in contravention of a controlling statute (a final agency action) or a claim that the government has effected an improper deprivation of property or violated equal protection (a constitutional violation). None involve a breach of trust arising out of the enactment of a statute.

Plaintiffs have cited only one case in which a court allowed a tribe to challenge an act as violative of Congress's federal trust responsibility to the Indians. In *Swimmer*, 740 F.Supp. 9, the court read *Delaware Tribal Business Council*, 430 U.S. 73, *Littlewolf*, 877 F. 1058, the *Mitchell* cases, 463 U.S. 206 and 445 U.S. 535, and a decision by the Court of Appeals for the District of Columbia in *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980), as permitting the Red Lake Band to sue the federal government on a claim seeking declaratory and injunctive relief for Congress's alleged violation of its special obligation to the Indians in passing the Indian Gaming Regulatory Act. *Id.* at 12-13. The court did not discuss the differences that might exist between bringing a challenge to an agency action concerning the handling of Indian property, as in *Mitchell*, or on a violation of the Constitution, as in *Littlewolf* and *Delaware*, and bringing a challenge to the gaming act that was based neither on the handling of property or an alleged constitutional violation. This deprives the case of any persuasive force. In fact, *Swimmer* seems to be an anomaly; it was not appealed and it has never been cited by any other court.

Plaintiffs have not shown any reason for finding that the United States has waived its sovereign immunity as to the common law breach of trust claim that they alleged and they have failed to show that such a claim would be viable. Therefore, as to this claim, their motion for judgment on the pleadings will be denied and defendants' and defendant-intervenors' motion will be granted.

B. *Constitutional Claims*

1. *Delegation doctrine*

Plaintiffs argue that the gubernatorial concurrence in the Indian Gaming Regulatory Act violates the delegation doctrine in two different ways. It impermissibly assigns the function of acquiring land for gaming in trust for the Indians

from the executive branch to state governors and it delegates authority to state governors without providing an intelligible principle to guide the governors' exercise of the delegated discretion. Defendants maintain that plaintiffs are wrong because (1) Congress has not usurped the executive branch's power for itself but rather delegated power to the state governor, a person not within the federal structure and (2) the gubernatorial concurrence constitutes "contingent legislation" and for this reason raises no delegation or separation of powers question.

Plaintiffs' first delegation argument rests upon *Printz v. United States*, 521 U.S. 898 (1997), the case in which the Supreme Court overturned the provision of the Brady Act requiring the chief law enforcement officer of each local jurisdiction to perform background checks on prospective handgun purchasers and perform certain other tasks on an interim basis until the national system became operative. The Court rested its decision on two grounds: the division of power between the state and federal governments and the separation of powers among the three branches of the federal government. In the first instance, commandeering local law enforcement officers to carry out congressionally directed tasks would violate the Tenth Amendment. In the second instance, the commandeering of local law enforcement officers to carry out Congress's legislative initiatives would undermine the power of the executive branch of the federal government, which under the Constitution has the authority to administer the laws that Congress enacts. *Id.* at 922.

The first *Printz* argument is best reserved for the discussion of plaintiffs' Tenth Amendment claim. The second requires little discussion. Although plaintiffs argue that the governors' concurrence provision transfers responsibility to fifty state governors "'who are left to implement the program without meaningful Presidential control," *Printz*, 521 U.S. at 522, and is therefore exactly like the Brady Act provision overturned

in *Printz,* their argument does not stand up to examination. In giving a say to the governors of states in which the Secretary of the Interior is considering taking lands in trust for Indian gaming, Congress was not giving state officials authority to execute congressional legislation, as in *Printz.* It was doing nothing more than giving the governors an opportunity to be heard on matters that affected the interests of their citizens, if they so chose.

I turn next to the second delegation of powers argument, that Congress cannot convey its lawmaking function to others. *See Loving v. United States*, 517 U.S. 748, 758 (1996) ("The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., art. I, § 1, and may not be conveyed to another branch or entity.") Chief Justice Rehnquist has described the doctrine as one that (1) requires Congress to make the important choices of social policy; (2) guarantees that when Congress does delegate authority, "it provides the recipient of that authority with an 'intelligible principle' to guide the exercise of the delegated discretion," *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 685-86 (1980) (quoting *J .W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (Rehnquist, J., concurring); and (3) gives reviewing courts ascertainable standards for testing the legitimacy of the delegated discretion. *Id.* As I have noted, defendants view the governors' concurrence provision as valid contingent legislation.

Certainly, contingent legislation is not unusual. Congress uses such legislation in many instances in which it cannot determine exactly when its exercise of legislative power should take effect. *See, e.g., Hampton*, 276 U.S. at 419 (upholding Congress's decision to give President authority to increase or decrease duties in order to equalize the difference between the cost of producing goods domestically and abroad). Congress can let other entities decide when the

legislation should take effect, such as the executive branch, as in *Hampton*, or the tobacco growers in a certain area, as in *Currin v. Wallace*, 306 U.S. 1 (1939). Although in such instances, one might say that others are exercising legislative power, "it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution." *Hampton*, 276 U.S. at 407. The Court has distinguished between "'the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.'" *Id.* at 407 (quoting *Cincinnati, W. & Z. Ry. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852)). Congress cannot do the former but "'to the latter no valid objection can be made.'" *Id.* *See Field v. Clark*, 143 U.S. 649, 694 (1892):

> Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.

(Internal quotation omitted).

The Supreme Court has upheld a number of instances of contingent legislation. For example, it affirmed the constitutionality of the Tobacco Inspection Act, 7 U.S.C. § 511(d), which allowed the Secretary of Agriculture to designate certain tobacco auctions as interstate tobacco markets, contingent on the concurrence of at least two-thirds of the affected farmers, *Currin*, 306 U.S. at 15 (noting that "it [was] Congress that exercise[d] its legislative authority in making the regulation and in prescribing the conditions of its application"), and it approved legislation authorizing the Secretary of Agriculture to define milk marketing areas and propose marketing orders that could go into effect only if

two-thirds of those affected approved. *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 577-78 (1939).

Plaintiffs argue that the gubernatorial concurrence is not permissible contingent legislation like that in *Hampton* and *Currin* but rather an impermissible delegation of power closer to that found in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). In fact, *Chadha* is not at all similar. *Chadha* involved Congress's attempt to give itself a one-house legislative veto over deportation decisions made by the Attorney General of the United States. In overturning the statute, the Supreme Court held that the effort "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch." *Id.* 952. Congress could take such an action only by passage of legislation in both chambers and presentment to the President. Neither house of Congress had the power to require the Attorney General to deport an alien once the Attorney General had made a contrary determination in the exercise of legislatively delegated authority. In *Chadha*, the Court was not concerned with the legitimacy of the delegation that Congress had made to the Attorney General but with the legitimacy of Congress's attempt to overrule the decisions the Attorney General made in the course of carrying out the delegated tasks. As a consequence, the case has little relevance to plaintiffs' challenge to the Indian Gaming Regulatory Act.

Moving on to a different but no more persuasive argument, plaintiffs contend that the gubernatorial concurrence provision is not permissible contingent legislation because it does not contain an intelligible principle or standards to enable reviewing courts to determine whether it is the will of Congress that is being carried out or that of another person or entity. Plaintiffs' argument focuses incorrectly on the nature of the concurrence rather than on 25 U.S.C. § 2719's explicit

provision that gaming shall *not* be conducted on after-acquired lands *unless* certain conditions have been met, one of which is the governor's concurrence. The statute fixes the limits of delegation "according to common sense and the inherent necessities of the governmental co-ordination." *Hampton*, 276 U.S. at 406. Congress has exercised its legislative authority by requiring the governor to concur in the Secretary's decision. It has prescribed the conditions that must be met before the general prohibition against gaming is lifted. *See Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 695 (9th Cir. 1997) (gubernatorial concurrence in Indian Gaming Regulatory Act is permissible contingent legislation); *United States v. Ferry County*, 511 F.Supp. 546, 552 (E.D. Wash. 1981) (upholding statute allowing Secretary of Interior to acquire land in trust for Indian tribe only if local county officials consented).

Plaintiffs fail to distinguish in any meaningful manner between the permissible contingency of two-thirds of the affected farmers in *Currin* and the gubernatorial concurrence in this case. In *Currin*, the statute provided that "[n]o market or group of markets shall be designated by the Secretary unless two-thirds of the growers voting favor it." *Id.* at 15. In this case, the statute provides that no gaming shall occur unless the Secretary makes a two-part determination and the governor concurs in that determination. 25 U.S.C. § 2719. Plaintiffs concede that this case would be analogous to *Currin* if § 2719 were contingent on a majority vote of the members of the applicant Indian tribes rather than a gubernatorial concurrence, without explaining how a two-thirds vote by the applicant Indian members would provide the standards that the gubernatorial concurrence lacks.

Plaintiffs argue that the *Currin* and *Rock Royal* line of cases is not relevant because those cases involved a vote of those to be regulated as opposed to a vote that permits one group to determine the law to be applied to another. They

cite *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), for the proposition that Congress violates the Constitution when it enacts legislation allowing one group to impose a law upon members of another group. *Carter* affords plaintiffs little help; it was a due process case in which the affected interests were constitutionally protected and the persons given the power to set maximum hours of labor and minimum wages for the entire coal industry. It is worth noting that the persons exercising the authority were private persons, although the delegation of powers discussion was not the basis for the Court's holding. The legislation at issue in *Carter* is nothing like the gubernatorial concurrence provision in the gaming act. A state's governor is not a private person imposing a law upon others; he or she is a state official representing the interests of all the state's citizens, including the members of Indian tribes. If Congress may delegate to tribal officials the power to regulate distribution of alcoholic beverages on reservation lands owned by non-members of the tribe, *United States v. Mazurie*, 419 U.S. 544, 554 (1975), it may condition legislation on the concurrence of a governor without violating the separation of powers doctrine.

2. *Appointments clause*

In an argument closely related to the delegation doctrine and also embedded in the principle of separation of powers, plaintiffs contend that the gubernatorial concurrence violates the appointments clause, U.S. Const. art. II, § 2, cl. 2, which gives the President authority to appoint "all . . . Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law." The courts have read this provision as permitting only persons who are "Officers of the United States" to discharge functions properly discharged by officers. *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757 (9th Cir. 1993) (qui tam relators did not have so much governmental power that they required appointment in conformity with appointments

clause). The Supreme Court has held that the appointments clause serves as a guard against one branch's aggrandizement of its power at the expense of another branch and preserves constitutional integrity by preventing the diffusion of the appointment power. *Freytag v. Commissioner of Internal Revenue,* 501 U.S. 868, 878 (1991).

The appointments clause applies to (1) all executive or administrative officers; (2) who serve pursuant to federal law; and (3) who exercise significant authority over federal government actions. *Buckley v. Valeo,* 424 U.S. 1, 123-27 & n.162 (1976); *see also Seattle Master Builders v. Pacific Northwest Electric Power & Conservation,* 786 F.2d 1359, 1365 (9th Cir. 1986). Unless all three prongs of the *Buckley* test are met, there is no violation of the appointments clause. *Seattle Master,* 786 F.2d at 1365.

The governor of Wisconsin was never appointed as a federal officer and he is not one in fact. His failure to concur in the Secretary's determination violated the appointments clause only if he was exercising significant authority *pursuant to the laws of the United States, Buckley*, 424 U.S. at 126, and he was vested with responsibility for vindicating public rights, *id.* at 140. Looking at the factors the court of appeals identified in *Confederated Tribes*, 110 F.3d at 697, I agree with that court that the authority a governor exercises under § 2719 is neither significant enough to require appointment as a federal officer nor exercised pursuant to the laws of the United States. The governor does not have the sole authority to enforce the Indian Gaming Regulatory Act; he or she concurs in or rejects a gaming proposal only on an episodic and infrequent basis; the Secretary of the Interior determines the federal interest in the project; and the governor has no power to require the Secretary to take land for gaming purposes. *Id.* Moreover, when the governor decides whether to concur or not, the governor is acting as a state official, performing a function that devolves on him only because of

his state office: the determination of the state's position in relation to the Secretary's proposal to acquire lands for Indian gaming. *Id.*

In *Buckley*, 424 U.S. 1, by contrast, the Court was considering the roles of the members of the Federal Election Commission, which had "primary and substantial responsibility for administering and enforcing the [Federal Election Campaign] Act," record-keeping, disclosure, investigative functions and extensive rule making and adjudicative powers. *Id.* at 110. In fact, the Act allowed the commission to "formulate general policy" and gave it "primary jurisdiction with respect to . . . civil enforcement." *Id.* The Supreme Court found the Commission's enforcement authority to be "both direct and wide ranging." *Id.* at 111.

Seattle Master Builders, 786 F.2d at 1362, supports defendants' argument that there is no comparison between the governor's narrow and episodic role under § 2719 and the Federal Election Commission's sweeping responsibility under the Federal Election Campaign Act. In that case, the petitioners challenged the creation of a regional energy conservation council that had certain authority over the Bonneville Power Administration, an agency of the federal government. The petitioners contended that the existence of the council violated the appointments clause because its members exercised significant authority over the federal government and were not appointed by the President. *Id.* at 1362-63. The Court of Appeals for the Ninth Circuit disagreed, holding that the council members were not officers subject to the appointments clause, but rather served under state law. *Id.* at 1365. The court noted that "the states ultimately empower the Council members to carry out their duties . . . [their] appointment, salaries and direction . . . are state-derived." *Id.* at 1365. It concluded that "*Buckley* is about maintaining the separation of powers within the federal government. . . . Because Congress neither appoints nor removes the members

of this Council, the balance of powers between Congress and the President is unaffected." *See also United States v. Germaine*, 99 U.S. 508, 512 (1879) (finding surgeon appointed by pension commissioner not subject to appointments clause because his job's tenure, duration, emolument and duties were only occasional and temporary).

3. *Tenth Amendment*

As a preliminary matter, defendants dispute whether plaintiffs have standing to bring a claim that the gubernatorial concurrence provision conscripts state governors into federal service in violation of the Tenth Amendment. Because the question of standing is a somewhat murky one in this circuit and is immaterial given the lack of merit in the substantive claim, I will not address it. (The murkiness arises from the conflict between the Supreme Court's holding in *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 144 (1939), that private corporations have no standing to assert their states' sovereign rights, and the Court of Appeals for the Seventh Circuit's decision in *Gillespie v. City of Indianapolis*, 185 F.3d 693, 700-03 (7th Cir. 1999), that a city police officer could raise a Tenth Amendment challenge to a federal statute prohibiting him from carrying a firearm because of his previous conviction of misdemeanor domestic abuse. Defendants argue that *Tennessee Electric Power* has never been withdrawn or overruled and that I must follow it and disregard *Gillespie*. They forget that, as a district court judge, I am bound by the court of appeals' interpretation of *Tennessee Electric*. *See Donohoe v. Consolidated Operating & Production Corp.*, 30 F.3d 907, 910 (7th Cir. 1994) (judges of inferior courts must carry out decisions of superior courts).)

The Tenth Amendment provides that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. As is

evident, the Tenth Amendment does not itself demarcate the boundary between state and federal authority. *See New York v. United States*, 505 U.S. 144, 156-57 (1992) ("The Tenth Amendment . . . is essentially a tautology."). Even when exercising one of its enumerated powers, Congress can run afoul of the Tenth Amendment by commandeering or conscripting state officials to carry out federal mandates. *See id.; Printz v. United States*, 521 U.S. 898 (1997). In other words, Congress may neither "compel the States to enact or administer a federal regulatory program," *New York*, 505 U.S. at 188, nor "conscript the State's officers directly" by assigning to them responsibility for enforcing federal laws, *Printz*, 521 U.S. at 935.

In *New York*, the Supreme Court struck down the Low-Level Radioactive Waste Policy Amendments Act, which required the states either to enact legislation providing for the disposal of radioactive waste or take title to the waste. The Court found that "'the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 176 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)). "No matter which path the State chooses, it must follow the direction of Congress." *Id.* at 177. In *Printz*, the Court struck down provisions of the Brady Handgun Violence Protection Act that required state and local officers to perform background checks on those seeking to buy a handgun. Citing *New York*, the Court held that the federal government "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz*, 521 U.S. at 935. The Court found that the Act "effectively transfers [the President's] responsibility to thousands of [law enforcement officers] in the 50 states, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control

is possible without the power to appoint and remove)." *Id.* at 922-23.

The Indian Gaming Regulatory Act neither commandeers nor conscripts the governor (or the state) to enact or administer a federal regulatory program. The gubernatorial concurrence presents the governor with a true choice: he may either do nothing or concur in the Secretary's two-part determination. *See Turfway Park,* 20 F.3d at 1415 ("[Interstate Horseracing Act of 1978] . . . does not require a State to do *anything* when presented with a request for its consent to off-track betting" and thus does not violate Tenth Amendment) (emphasis in original). Moreover, if the governor opts to do nothing the status quo remains intact. Unlike the "choice" presented by the statute in *New York,* the governor (or the state) need not enact legislation, promulgate rules or enforce a federal regulatory program. The effect of the governor's inaction is to preserve the general federal prohibition of gaming on newly acquired off-reservation land. That result does not amount to "regulation." The gubernatorial concurrence does not offend the Tenth Amendment or principles of federalism.

4. *Equal protection*

Although plaintiffs asserted an equal protection claim in their complaint, they failed to argue it in their briefs. "Arguments not developed in any meaningful way are waived." *Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 808 (7th Cir. 1999).

5. *Severability*

Because I find that the Indian Gaming Regulatory Act's gubernatorial concurrence provision, 25 U.S.C. § 2719(b)(1)(A), is constitutional, it is unnecessary to address the parties' severability arguments.

C. *Conditional Motion to Amend Complaint*

Plaintiffs have moved "conditionally" for leave to amend their complaint. The conditional event is a ruling by this court that the gubernatorial concurrence provision is constitutional. Now that this has happened, plaintiffs want the opportunity to argue that the governor's non-concurrence is invalid because former Governor McCallum failed to concur with the Secretary's two-part determination that (1) "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members" and (2) "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Plaintiffs characterize former Governor McCallum as "not properly apply[ing] the two factors" and "completely ignor[ing] the standards provided by Congress." Plts.' Br., dkt. #22, at 51, 53.

Plaintiffs do not explain whether they are seeking to assert another claim or simply raising an argument that they failed to make during the briefing on the cross-motions for judgment on the pleadings. They argue first that they are not required to plead legal theories in their complaint and second, that they are *not* seeking to add any additional factual allegations to the complaint. Instead, they say that they wish to amend their complaint "to put the parties and the Court on notice that the already-alleged facts, in light of defendants' new position with respect to the interpretation of the statute at issue, give rise to a legal theory not addressed in the pending motions for judgment on the pleadings, a theory that may become ripe depending on how those motions are resolved." Plts.' Reply, dkt. #31, at 3. It appears that plaintiffs are attempting to cloak an undeveloped argument as a "claim" that needs to be added to the complaint.

Whatever the true nature of plaintiffs' proposed amendment, it comes too late in this suit. Plaintiffs filed this lawsuit on May 10, 2001, and filed their first amended complaint on July 2, 2001. Plaintiffs assert that they could not

have amended their complaint earlier because they needed to know whether this court found the gubernatorial concurrence constitutional but fail to explain why they had to know the validity of the concurrence before making their argument. It is reasonable to expect counsel to make all their arguments at one time, even if some of the arguments are conditional upon the outcome of others.

Although leave to amend a complaint should be freely granted when justice so requires, *see* Fed. R. Civ. P. 15(a), a court need not allow an amendment when there is undue delay, bad faith, dilatory motive, undue prejudice to the opposing party, or when the amendment would be futile. *Bethany Pharmacal Co., Inc. v. QVC, Inc.*, 241 F.3d 854, 860-61 (7th Cir. 2001). At a minimum, plaintiffs' motion comes within the category of undue delay. As plaintiffs concede, the factual basis of their new claim is identical to the factual basis of their constitutional and breach of trust claims; therefore, plaintiffs could have brought this new claim at the time they filed their original complaint. *See Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 625 (7th Cir. 1987) ("In view of [plaintiff's] failure to adequately explain the unreasonable delay in moving to amend his complaint to state a claim for punitive damages when all of the information necessary to stating such a claim has been available to him for eighteen months, we agree with the judgment and reasoning of the district court that [plaintiff's] motion represents an apparent attempt to avoid the effect of summary judgment [on his other claims].") (Internal quotation marks omitted).

Former Governor McCallum is no longer a party to this case. He intervened in his official capacity; under Fed. R. Civ. P. 25(d)(1), his successor, James E. Doyle was substituted as a party. Moreover, plaintiffs have not explained what kind of a claim they would be bringing against McCallum (or against the other defendants for McCallum's alleged failure to

carry out his duty properly). They are seeking declaratory and injunctive relief; McCallum is no longer governor and therefore not in a position to provide such relief. Neither the state nor present Governor Doyle would be proper defendants; they are not accused of violating the law. Plaintiffs cannot sue the federal defendants under 42 U.S.C. § 1983 because § 1983 actions can be maintained only against persons who take action under color of *state* law to violate the constitutional rights of others. Plaintiffs cannot sue any of the defendants under the federal Administrative Procedure Act; that act cannot provide a jurisdictional basis for a claim that a state governor acted improperly. Plaintiffs' conditional motion to amend their complaint will be denied for undue delay and for plaintiffs' failure to show that allowing such an amendment would not be a futility.

ORDER

IT IS ORDERED that

1. Plaintiffs' motion for judgment on the pleadings is DENIED;

2. Defendants' and defendant-intervenors' motion for judgment on the pleadings is GRANTED;

3. Plaintiffs' conditional motion to amend the complaint is DENIED; and

4. The clerk of court is directed to enter judgment in favor of defendants and defendant-intervenors and close this case.

Entered this 22d day of April, 2003.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS AND SAKAOGON CHIPPEWA COMMUNITY (MOLE LAKE BAND OF LAKE SUPERIOR CHIPPEWA INDIANS),

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, THE HONORABLE GALE NORTON, Secretary of the Department of the Interior and JAMES H. MCDIVITT, Deputy Assistant Secretary/Indian Affairs,

Defendants,

and

JAMES E. DOYLE, Governor of the State of Wisconsin and STATE OF WISCONSIN,

Defendants-Intervenors.

ORDER

02-C-553-C

[Stamped "A copy of this document has been mailed to the following: Attys Herje, Passarelli, Greene, Gede & Farris this 15 day of July, 2003 by S. Vogel, Secretary to *Judge* CRABB"]

On April 22, 2003, I granted defendants' and defendant-intervenors' cross-motions for judgment on the pleadings and denied plaintiffs' cross-motion for judgment on the pleadings and their conditional motion for leave to file a second

amended complaint. The clerk of court entered judgment on April 24, 2003. Now plaintiffs have moved to vacate the judgment pursuant to Fed. R. Civ. P. 59(e), arguing that the court erred when it denied their conditional motion to file a second amended complaint. (The conditional event was a ruling by this court that the gubernatorial concurrence is constitutional, which came to pass when I granted defendants' and defendant-intervenors' motions for judgment on the pleadings.) As a result, plaintiffs argue, the court failed to consider their argument that the Secretary of the Department of Interior neglected to perform her statutory duties under 25 U.S.C. § 2719(b)(1)(A) when she failed to evaluate the basis for the governor's non-concurrence.

As to the substance of their so-called "conditional" motion to file a second amended complaint, plaintiffs still do not see the logical infirmity of arguing that a complaint need not plead legal theories while at the same time arguing that they need to amend their complaint "to put the parties and the Court on notice that the already-alleged facts, in light of defendants' new position with respect to the interpretation of the statute at issue, give rise to a legal theory not addressed in the pending motions for judgment on the pleadings, a theory that may become ripe depending on how those motions are resolved." Plts.' Reply in Supp. Of Plts.' Cond. Mot. To File Second Am. Cpt., dkt. #31, at 3. In other words, plaintiffs wanted this court to allow them to amend their complaint to plead a new legal theory even though they concede that a complaint need not plead legal theories.

Although it is true that plaintiffs need not plead legal theories in a complaint, *see Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998), plaintiffs must *argue* legal theories in their briefs. Plaintiffs cannot remain silent about an alternative legal theory when a dispositive motion is before the court and then ask the court "conditionally" to amend the complaint to include the unspoken theory if they lose. As is

well established, "[a]rguments not developed in any meaningful way are waived." *Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 808 (7th Cir. 1999).

Plaintiffs argue that a motion for judgment on the pleadings is subject to a motion to dismiss standard rather than the summary judgment standard. In other words, to succeed on their motion for judgment on the pleadings, defendants and defendant-intervenors had to show that the factual allegations do not support *any* legal theory that could entitle plaintiffs to relief. Although plaintiffs' general assertion might well be true in some instances, it is not in this case. The parties sought to dispose of their dispute on the basis of the underlying substantive merits and as a matter of law. *See Alexander v. City of Chicago*, 994 F.2d 333, 336 (7th Cir. 1993) (treating motion for judgment on the pleadings like motion for summary judgment when parties seek "to dispose of the case on the basis of the underlying substantive merits"); *see also* Wright & Miller, 5A *Federal Practice and Procedure* Civil 2d § 1369 ("Both the summary judgment procedure and the motion for judgment on the pleading are concerned with the substance of the parties' claims and defenses and are directed towards a final judgment on the merits. Indeed, the standard applied by the court appears to be identical under both motions."). Thus, for all intents and purposes, the parties' cross-motions for judgment on the pleadings could have been labeled cross-motions for summary judgment.

The case proceeded as follows. Defendants and defendant-intervenors each moved for judgment on the pleadings, arguing the legal theories that plaintiffs pleaded explicitly in their complaint. *See* Am. Cpt., dkt. #1 (complaint alleged only constitutional and breach of trust violations). In response, plaintiffs said nothing as to their new, alternative legal theory. In fact, plaintiffs unambiguously disclaimed this

theory early in the lawsuit during a judicial hearing, *see* Dfts.' Resp., dkt. #38, Exh. 1, July 19, 2001 Hearing, at 15 ("This case involves a challenge to what Congress did. It is not a challenge to what the Department of Interior has done; it is not a challenge, in fact to what the Governor has or has not done."). Moreover, plaintiffs filed their own motion for judgment on the pleadings in which they argued the *same* legal theories asserted in their complaint and argued by defendants and defendant-intervenors. In light of plaintiffs' complaint, briefs, and assertions in court, it is impossible to imagine how defendants or defendant-intervenors could have known of plaintiffs' alternative legal theory short of telepathy. *See Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996) ("[Rule 59] does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment.").

Although plaintiffs contend that a motion for *partial* judgment on the pleadings is permissible, they fail to explain how this contention is relevant to this case. Plaintiffs did not move for a *partial* judgment on the pleadings; they moved for a total judgment. Finally, plaintiffs argue that "both the proposed second amended complaint and *plaintiffs' response to defendants' motion for judgment on the pleadings* explicitly set forth this claim for relief. *See* Proposed Amended Complaint ¶ 13, 61-64; Plaintiffs' Combined Response /Reply Brief at 51-55." Plt.'s Reply in Supp. Of Rule 59 Mot., dkt. #39, at 5 (emphasis added). In other words, plaintiffs assert that they raised their new legal theory while briefing the cross-motions for judgment on the pleadings, the dispositive motion before the court. This is incorrect.

Plaintiffs submitted (1) a reply brief in support of their motion for judgment on the pleadings and a response brief in opposition to defendants' and defendant-intervenors' motion

for judgment on the pleadings and (2) a brief in support of their conditional motion to amend the complaint. Plaintiffs assert that on pages 51 to 55 of their "combined response/ reply brief," they raised this new legal theory. However, these pages are captioned "ARGUMENT IN SUPPORT OF PLAINTIFFS' CONDITIONAL MOTION TO AMEND THE COMPLAINT." Although plaintiffs submitted both briefs under the same cover, they packaged their arguments as to each motion separately. In fact, when the combined brief was docketed, it was issued two docket numbers, #22 and #23. Plaintiffs never raised their new legal theory in support, response or reply to any motion for judgment on the pleadings. Instead, plaintiffs raised this theory in their brief in support of their conditional motion to amend the complaint, which effectively was an attempt to do an end run around the prohibition against asserting a new legal claim in a reply brief. *See United States v. Turner*, 203 F.3d 1010, 1019 (7th Cir. 2000) (arguments raised for the first time in reply brief are waived); *James v. Sheahan*, 137 F.3d 1003, 1008 (7th Cir. 1998) (same). The fact that plaintiffs filed a motion to amend the complaint conditioned on their losing the dispositive motion should say something about the merits of this motion in and of itself.

Because nothing in plaintiffs' Rule 59 motion convinces me that I erred in denying either their cross-motion for judgment on the pleadings or their conditional motion for leave to file a second amended complaint, their motion to vacate the judgment will be denied.

ORDER

IT IS ORDERED that plaintiffs' motion to vacate the judgment pursuant to Fed. R. Civ. P. 59(e) is DENIED.

Entered this 14th day of July, 2003.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 19, 2004

No. 03-2323

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, RED CLIFF BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, AND SAKAOGON CHIPPEWA COMMUNITY, MOLE LAKE BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, GALE A. NORTON, Secretary of the Department of the Interior, *et al.*,

Defendants-Appellees,

JAMES E. DOYLE, Governor of the State of Wisconsin and STATE OF WISCONSIN,

Intervening Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin, No. 02-C-553,

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BARBARA B. CRABB, *Chief Judge*, Hon. JOEL M. FLAUM, *Chief Judge*, Hon. KENNETH F. RIPPLE, *Circuit Judge*. Hon. ILANA D. ROVNER, *Circuit Judge*

ORDER

On consideration of the petition for rehearing and petition for rehearing en banc filed in the above-entitled case on June 14, 2004, by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX D

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

"CERTIFIED MAIL – RETURN RECEIPT REQUESTED"

[Stamped "JUN 13 2001"]

HONORABLE JEAN BUFFALO-REYES
Tribal Chairperson
Red Cliff Band of Lake Superior Chippewa
Indians of Wisconsin
P. O. Box 529
Bayfield, Wisconsin 54814

HONORABLE GAIASHKIBOS
Tribal Chairperson
Lac Courte Oreilles Band of Lake Superior
Chippewa Indians of Wisconsin
13394 West Trapania Road, Bldg., No.1
Hayward, Wisconsin 54843

HONORABLE ROGER MCGESHICK, JR.
Tribal Chairman
Sokaogon Chippewa Community
of Wisconsin
Route 1, Box 625
Crandon, Wisconsin 54520

Dear Tribal Leaders:

Pursuant to the Settlement Agreement dated October 8, 1999, in the case *Sokaogon Chippewa Community, et al., v. Babbitt, et al.*, Case No. 95-C-659-C (W.D. Wis.), the Assistant Secretary—Indian Affairs agreed to resume consideration of the March 4, 1994, application of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin,

Sokaogon Chippewa Community of Wisconsin and the Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin (Tribes). The Tribes made application for a fee-to-trust transfer of a 55.82 acre parcel of land located in Hudson, Wisconsin, pursuant to 25 U.S.C. § 465 and 25 CFR Part 151, and for a Secretarial two-part determination pursuant to § 20 (b)(1)(A) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719(b)(1)(A). I must respectfully decline the request that we take this land into trust for gaming purposes.

Pursuant to § 20(b)(1)(A) of the IGRA and delegated authority, by letter dated February 20, 2001, I determined that the proposed gaming establishment was in the best interest of the Tribes and their members and that it would not be detrimental to the surrounding community. In the same letter, I also had requested the concurrence by the Governor of the State of Wisconsin (Governor) in my determination. The IGRA requires that the Governor concur in the determination. On February 20, 2001, my determination was sent by telefax to the Governor and to the Tribes, through their attorney, James Reeder. The administrative record also was sent to the Governor on February 20, 2001.

In a letter dated May 14, 2001, a copy of which is enclosed, the Governor declined to concur in that determination. In a letter dated May 15, 2001, the Tribes requested the Department hold this matter in abeyance until alternatives were considered.

Section 20 of the IGRA, 25 U.S.C. § 2719, generally prohibits gaming on trust lands acquired after October 17, 1988, unless certain exemptions apply. The exemption applicable here, 25 U.S.C. § 2719(b)(1)(A), establishes that gaming can be conducted if the Secretary makes a two-part determination that the gaming establishment is in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community "but only if the Governor of the State in which the gaming activity is to be conducted concurs

in the Secretary's determination." Congress has placed a limitation on the use of the land and IGRA does not authorize gaming on the proposed trust land without the concurrence of the Governor. Consequently, because the Governor declined to concur in the two-part determination, the land cannot be acquired in trust for the purpose of gaming.

We have considered the Tribes' request for abeyance and believe that this decision does not preclude the Tribes from considering alternative non-gaming uses for the land. The limitation imposed by Congress on the use of the land should not be interpreted as a prohibition against acquiring the land in trust for any other purposes. Therefore, if the Tribes desire to acquire the land for some non-gaming purpose, please reapply under the trust acquisition regulations at 25 CFR Part 151.

We regret that our decision could not be more favorable at this time. If you have any questions, please contact Nancy J. Pierskalla, Office of Indian Gaming Management at (202) 219-4066.

Sincerely,

/s/ James H. McDivitt
JAMES H. MCDIVITT
Deputy Assistant Secretary—
Indian Affairs
(Management)

Enclosure

SCOTT McCALLUM

Governor
State of Wisconsin

Room 115 East, State Capitol
P. O. Box 7863
Madison, Wisconsin 53707
(608) 266-1212
FAX (608) 267-8983

May 11, 2001

JAMES H. MCDIVITT
Deputy Assistant Secretary-Indian Affairs
United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

Dear Mr. McDivitt:

I am in receipt of your February 20, 2001, correspondence to me in which you inquire whether I concur, pursuant to Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2719, in your determination that approval of the application of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewas, and Sokaogon Chippewa Community (Tribes) to take a 55.82 acre parcel of land located in Hudson, Wisconsin, into trust for purposes of conducting Class III gaming is in the best interests of the Tribes and not detrimental to the surrounding community. By this letter I provide notice I do not concur in this determination.

The role of the Governor is prescribed in Section 20 of the IGRA, which allows class III gaming on certain off-reservation land only if:

> ". . . the Secretary [of the Department of the Interior] . . . determines that a gaming establishment on newly

> acquired lands would be in the best interest of the Indian Tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination. . . ." 25 U.S.C. 2719(b)(1).

The federal and State decisions regarding the determinations required by Section 20 of the IGRA are distinct for a number of reasons. First, this request for concurrence is unprecedented because the administrative record on which the Department's decision (federal determinations required by section 20 will be referred to as those of the Department) is based is that which existed on July 14, 1995, except for certain information related to compliance with the National Environmental Policy Act (NEPA), and materials related to a hazardous substances survey and arrangements between the Tribes and proposed management contractor. This extraordinary situation was created by a settlement agreement in a lawsuit in the United States District Court for the Western District of Wisconsin challenging the previous decision of the Secretary to deny the Tribe's application. See Appendix A to Stipulation and Order for Dismissal (Settlement Agreement), *Sokaogon Chippewa Community, et al., v. Babbitt, et al.*, #95-C-0659-C (W.D. Wis.), paragraph 8.b. I am not bound by such an artificial restriction in my deliberations.

In establishing separate federal and state approvals, Congress recognized that federal and state concerns and interests relative to an off-reservation gaming application would be different, and established a requirement that both must be satisfied before gaming could occur. The Department acts according to federal criteria, duties and responsibilities, many of which are unique to the federal government. For example, as acknowledged in paragraph 7 of the Settlement Agreement, the Secretary has a trust responsibility relative to Tribes, including the applicants. A Governor, in exercising discretion whether to concur, acts as a state official under

state authority to protect state and local concerns and interests. *See Confederated Tribes of Siletz Indians of Oregon v. U.S., et al.*, 110 F.3d 688, 693 (9th Cir. 1997).

The determinations required under Section 20 of the IGRA provide a Governor substantial discretion and encompass a multiplicity of factors, circumstances, and public policy considerations which a Governor must analyze and weigh in the exercise of his or her independent judgment. Therefore, a Governor, to fulfill the duties and responsibilities of that office, must consider numerous facts and circumstances which may not be considered by, or be important to, the Secretary in making the determinations required by Section 20 of the IGRA. One such area is the public policy of the State of Wisconsin regarding the casino gaming industry, particularly as applied to off-reservation casinos.

Originally, this State's policy towards gambling was one of complete prohibition. The Wisconsin Constitution, as adopted in 1848, provided in Article IV., Section 24, that the Legislature ". . . shall never authorize any lottery. . . .", which was interpreted by the courts as a strong statement of public policy against any activity involving the elements of prize; consideration and chance. *State ex rel. Trampe v. Multerer*, 289 N.W. 600, 603 (Wis. Sup. Ct. 1940).

Since that time, this complete prohibition has been amended to allow certain charitable organizations to conduct bingo and raffles, the State to operate a lottery, and to allow on-track pari-mutuel wagering. These changes in public policy were accomplished by first amending the Wisconsin Constitution. This process required each change to obtain explicit legislative authorization and the consent of the citizenry through a referendum.

These changes were also limited in scope. Bingo and raffles were limited to certain classes of charitable public service organizations. Pari-mutuel wagering was limited so

that it could occur only on the grounds of a licensed racetrack. The Wisconsin Lottery may operate only games involving the matching chosen numbers against numbers randomly drawn, or instant ticket games involving preprinted numbers or symbols.

The only form of gambling currently allowed in Wisconsin which has been subject to neither explicit legislative authorization nor public referendum is casino gambling operated by Wisconsin Tribes pursuant to the IGRA. This anomalous development resulted from a decision of the United States District Court for the Western District of Wisconsin, which held that when the Constitution was amended to authorize a lottery, with no limiting definition on what was meant by that term, lottery would be construed to mean any game involving prize, chance and consideration. Consequently, because the authorization to conduct a "lottery" was sufficiently broad to include casino type games, even though no Wisconsin citizens were authorized to conduct such games, the IGRA required the State to negotiate casino gaming with the State's 11 Tribes. *See Lac du Flambeau Band of Lake Superior Chippewa Indians, et al. v. Wisconsin, et al.*, 770 F.Supp. 480, 485-487 (W.D. Wis. 1991).

The concern regarding the extent to which the Constitutional amendment authorizing the State Lottery actually altered the public policy towards gambling by allowing casino games was initially addressed at a 1992 special session of the Wisconsin Legislature, which resulted in the enactment of 1991 Wisconsin Act 321, effective January 1, 1993. This act specifically exempted casino style games from the definition of lottery authorized by the Wisconsin Statutes, and made clear such games were not authorized by these provisions of Wisconsin law, but did provide that the provisions of any Indian gaming Compact entered into prior to January 1, 1993 would not be affected. s. 565.01(6m), Stats.

The process to amend the Wisconsin Constitution to reflect these same restrictions was also begun during the special session, culminating in an April 6, 1993, statewide referendum regarding the Constitutional amendment. The question presented to the voters read: "*Gambling expansion prohibited.* Shall article IV of the constitution be revised to clarify that all forms of gambling are prohibited except bingo, raffles, pari-mutuel on track betting and the current state-run lottery and to assure that the state will not conduct prohibited forms of gambling as part of the state-run lottery?" The question was approved by a vote of 1,075,386 to 435,180. The result is reflected in Article IV., Section 24(6) of the Wisconsin Constitution, which specifically prohibits the State from authorizing casino style gambling.

The public policy of Wisconsin towards gaming may be characterized as allowing limited exceptions to the general prohibition against gambling after legislative authorization and ratification by the voters pursuant to the established procedures for constitutional amendment. The exception to this characterization is casino gaming, which came about as a result of the interaction of federal law and a broad judicial interpretation of Wisconsin law, not by an affirmative action of Wisconsin policy-makers to authorize casino games.

When faced with the proposition that Wisconsin law allowed casino gaming, the Legislature, Governor and citizens acted promptly to make clear that Wisconsin public policy did not authorize, and in fact prohibited, casino gambling. A statutory exception was carved out for casino gaming operated under gaming compacts then in effect. At that time, as now, gaming conducted pursuant to those Compacts was generally limited to Indian lands within Tribal reservations.[1] While Tribal governments possessed the right

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[1] The Ho-Chunk Nation is the only Tribe within this State without a land base designated as a reservation. The Nation's gaming activities are

to conduct casino games which were denied to non-Tribal entities, casino siting was limited to those geographical areas reserved for the occupation of Tribal members and over which the Tribal government exercised the attributes of sovereignty reserved to it.

This decision involves novel implications regarding the State's policy towards gaming because it would authorize a new casino at an off-reservation site.[2] The proposed casino site was chosen not in relation to the geographical boundaries that define Tribal dominion, but on the basis of market considerations to maximize revenue to the proprietors, both Tribal and non-Tribal. Undoubtedly, there are many locations in Wisconsin which would support additional gaming facilities of varying size, thus allowing Tribes to realize greater revenues from gaming. Approval of the Tribes' application would set a precedent sanctioning the notion that Tribal governments could behave as if they were simply individual gaming firms, attempting to capture the greatest possible share of the statewide gaming market and choosing from among different statewide sites driven primarily by considerations of profit maximization. This is precisely the

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limited by Compact terms to certain Tribal land within certain enumerated areas.

[2] I am mindful of the fact that Wisconsin has authorized an off-reservation gaming facility of the Forest County Potawatomi Community of Wisconsin in Milwaukee. However, the procedures to acquire that site in trust for gaming purposes pre-dated the effective date of the IGRA. At the time the Governor was called upon to grant his concurrence the decision defining the State's obligation to negotiate regarding casino games was still almost a year away. In addition, no Compacts had been executed and the Indian gaming industry was still in its' infancy. Once those Compacts were executed they provided that gaming off-reservation was not permissible and could occur with Section 20 approval, with its attendant requirement of concurrence of the Governor. Consequently, the decision to concur regarding the Milwaukee facility is not indicative of the State's public policy towards off-reservation gaming facilities.

type of casino gaming industry the State sought to avoid when it unequivocally rejected casino gambling as a constitutionally permissible activity. The effect of the State's changes to its' public policy regarding gaming should not be to grant the 11 Wisconsin Tribes a monopoly on gaming so that they may develop a state-wide casino gaming industry which has been denied to all others.

Independent of any industry-wide effects, the addition of a single new casino, in this case a large facility intended to serve a major metropolitan market, is detrimental to the public interest. Wisconsin now has 17 separate casinos, a total of 22 separate sites where electronic games of chance are operated, and in excess of 16,000 electronic games of chance in operation statewide. All this is in addition to the State's other forms of legalized gaming. The public interest is simply not served by the addition of a major casino gaming facility to the existing gaming industry.

The proscriptions enacted by the Legislature, Governor and the citizens in our Constitution, and those implemented through statute, are the determinations of our civil society that certain actions operate to the detriment of the public interest, and this detriment affects all individuals, entities and communities. These laws act as both enforceable prohibitions, and as judgements by the State that certain activities so detract from the common good that their pursuit should be abandoned. Pursuant to the unique facts, circumstances and developments which established the legal principles governing Indian gaming, the State agreed to allow the operation of certain games by the Tribes, and the laws do not act as enforceable prohibitions against certain Tribal gaming activities. However, the question before me firmly places Wisconsin at a crossroads, the divergent paths of which lead to far different futures for this State. I cannot ignore the public policy reflected in our laws in making this determination.

In order to concur in the determinations made by the Department, I must be able to conclude that the proposal to construct and operate a new off-reservation casino is consistent with the public policy of the State, which applies equally to all its' local communities and citizens. For the reasons set forth above, approval of the Tribes' application would be in derogation of these interests. Therefore I do not concur with the determination under Section 20 of the IGRA.

Sincerely,

/s/ Scott McCallum
SCOTT MCCALLUM
GOVERNOR